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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-784

CITY OF CHICAGO, RICHARD J. DALEY, AND FRED B. ROTI, ET AL., MEMBERS OF THE CITY COUNCIL OF THE CITY OF CHICAGO,

Petitioners,

vs.

DOROTHY GAUTREAUX, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, City of Chicago, Richard J. Daley, and Fred B. Roti, et al.,* Members of the City Council of the City of Chicago, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered May 18, 1973.

---

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OPINIONS BELOW.

The opinions of the Court of Appeals, reported at 480 F. 2d 210 (7 Cir. 1973), are reproduced in Appendix A to this Petition. The order of the District Court, reported at 342 F. Supp. 827 (N. D. Ill. 1972), is reproduced in Appendix B to this Petition. Also reproduced are the original Memorandum Opinion (296 F. Supp. 907 (N. D. Ill. 1969)) and Judgment Order, 304 F. Supp. 736 (N. D. Ill. 1969) of the District Court as, respectively, Appendix C and Appendix D.

JURISDICTION.

The judgment of the Court of Appeals was filed May 18, 1973. A timely petition for rehearing was denied July 20, 1973. On October 10, 1973, an order was entered by Mr. Justice William H. Rehnquist extending the time in which to petition for writ of certiorari to and including November 16, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Does the Equal Protection Clause of the Fourteenth Amendment impose an affirmative duty on local legislatures to alleviate "racial imbalance" in the distribution of public housing sites, in the absence of the commission of a constitutional violation.
2. May a state statute requiring local legislative approval of public housing be set aside, as a remedial measure, where the local legislature was not a party to the proceeding in which liability was established, where the local legislature has not been found to have committed a constitutional violation, and where local legislative objectives have not been found to be unconstitutional.

STATUTE INVOLVED.

Illinois Revised Statutes 1971, Chapter 67½, Paragraph 9 (in pertinent part):

> "If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority."

STATEMENT OF THE CASE.

The judgment of the Court of Appeals affirms a District Court order setting aside an Illinois statutory provision requiring local government approval prior to the acquisition of real property to be used for the construction of public housing, and directing the Chicago Housing Authority (a state-created public corporation) to proceed, without City Council approval, to "begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon. . . ."

The local government involved is the City of Chicago. The City, its mayor and the members of its city council were added for the first time as defendants in this litigation by a Supplemental Complaint filed some six years after the filing of the complaint and three years after the entry of judgment. The original complaint was filed in District Court naming as defendant the Chicago Housing Authority (CHA), and alleging that the defendant intentionally chose sites for family public housing for the purpose of maintaining existing patterns of residential separation of races in the City of Chicago, in violation of 42 U. S. C. §§ 1981 and 1983.

The District Court's analysis of the question of public housing site selection began by eliminating from consideration all public housing for the elderly "of which 54½% are in substantially white neighborhoods," 296 F. Supp. 907, 911. Restricting the inquiry to family units, the court noted that the vast majority of the family units were located in areas which had or soon would have a substantially black racial composition; further, most residents of the housing were black. Without more, the court, at 910, concluded that

> "It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas came about with-

> out the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas."

The court observed that all sites selected by CHA must be approved by the City Council of the City of Chicago pursuant to Paragraph 9, Chapter 67½, Illinois Revised Statutes. CHA, it was alleged, would informally submit sites for family housing to the alderman in whose ward the site was located. On the basis of depositions taken from CHA officers, the court reasoned that "Most aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes" (at 914). At the same time, the court found it "undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal" (at 914), and that "It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods" (*ibid.*). Again, these findings were made long before the petitioners were added as parties, and when the only defendant was CHA. Relying upon the various affidavits and depositions (no witnesses were heard in open court), the court granted plaintiffs' motion for summary judgment.

On July 1, 1969, a judgment order was entered (304 F. Supp. 736; see Appendix D) dividing Cook County, Illinois, into two areas, the "Limited Public Housing Area" consisting of all census tracts having 30% or more non-white population and all tracts within one mile of any such tract; and the "General Public Housing Area" consisting of all remaining census tracts. CHA was enjoined from constructing any dwelling units in the Limited Area until 700 units had first been located in the General Area. Thereafter, construction was to proceed with at least 75% of all dwelling units to be constructed in the General Area and 25% in the Limited Area.

On March 5, 1971, more than twenty months later, CHA submitted sites for consideration by the City Council. The 235 sites, providing for some 1,450 dwelling units within the General Public Housing Area, were referred to the Council's Planning and Housing Committee. Subsequently, CHA withdrew 83 of the 235 sites for various reasons affecting their acceptability. During June of 1971 the committee held hearings on 43 of the sites; 12 sites were approved and 31 disapproved. Shortly thereafter, the City Council approved the 12 sites recommended by the committee, and also approved, on its own initiative, 32 additional sites in the General Public Housing Area which had not been in the CHA submission. The total thus approved by the Council between March and June of 1971 was 44 sites in the General Area, yielding approximately 300 dwelling units. The Council then adjourned for its summer recess, holding only one regular meeting between June and September 15, 1971.

On September 17, 1971, plaintiffs moved in district court to enjoin the funding of the Chicago Model Cities program until all of the submitted sites were approved. The district court granted the injunction, which was reversed by the Seventh Circuit on March 8, 1972 (*Gautreaux* v. *Romney*, 457 F. 2d 124, 7 Cir. 1972).

While the Model Cities appeal was under advisement by the Court of Appeals, plaintiffs filed a Supplemental Complaint adding for the first time as parties defendant the City of Chicago, the Mayor of the City of Chicago, the fifty members of the City Council. The Supplemental Complaint added these parties only for the purpose of granting relief to the plaintiffs. A hearing on the Supplemental Complaint was then held, in which plaintiffs introduced a stipulation of facts, several exhibits, then rested.

Defendants' case began with testimony as to the sites not approved, which were shown to be in violation of the city's zoning ordinance, or otherwise burdensome upon public services. Testimony was given as to the vast area from which any public

housing is excluded by the district court's order. Approximately 98 percent of all city-owned land, all acquired through demolition proceedings, is located within the Limited Public Housing Area. Approximately 80 percent of the residentially-zoned vacant land in the City is located within the Limited Public Housing Area. Testimony was introduced as to the deterioration afflicting neighborhoods within the Limited Area. The need for new construction, the unavailability of private investment, and the necessary role of new public housing in stabilizing an area were all placed before the district court. There was also testimony concerning the special problems affecting the Spanish-speaking community. Many Latin Americans live with the so-called buffer zone, the belt which includes all census tracts within one mile of tracts with a population that is 30 percent or more black. Representatives of that community stated that language and cultural services available within the various Spanish-speaking communities could not be provided to Latin Americans forced to live in widely dispersed housing. Public housing, however, is not available in these communities and, under the judgment order, may be constructed at only a negligible rate.

The district court, at the conclusion of the hearing, granted the relief sought by the plaintiffs, directing CHA to proceed with land acquisition without first seeking city council approval. On appeal, the Seventh Circuit affirmed the district court's order, with opinions filed by Sprecher, J., and Swygert, C. J., and a dissenting opinion by Pell, J. It is for review of this judgment that this petition is submitted.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS INTERPRETS THE EQUAL PROTECTION CLAUSE IN A WAY THAT ADVERSELY AFFECTS NATIONAL HOUSING POLICY BY ESTABLISHING AN AFFIRMATIVE DUTY TO ALLEVIATE "RACIAL IMBALANCE" OUTSIDE THE CONTEXT OF A CONSTITUTIONAL VIOLATION.

The district court was explicitly informed by the respondents that they

> "need not establish and they do not intend to try to establish that there is a racially discriminatory motivation lying behind the obstacle of the City Council's veto power or, indeed, that there may not be benign reasons for the City Council not having acted on any individual sites . . . [T]he Court has the power to enter the declaratory judgment we seek without proof of that kind of motivation and without proof that there may not be valid state reasons, benign state reasons, for nonaction." Transcript, pp. 13-14.

The opinions of the Court of Appeals, explicitly and implicitly, accept that theory, elevating it to a constitutional principle. "It is today well established," wrote one of the majority judges, "that the failure of a municipality to alleviate racial imbalance in housing may be as grievous a violation of the equal protection clause as is direct action by a public body to advance discrimination among the races" (480 F. 2d at 216, footnote omitted). "The Council by its delay," he wrote, "perpetuated a racially unbalanced distribution of public housing in the City of Chicago." In a note to the sentence just quoted, the opinion concedes that the cases relied upon for its proposition concerning racial imbalance

> "differ factually in that the acts and omissions of the enjoined governmental entity were the direct cause of racially

> imbalanced housing conditions. As I have noted, the same cannot be said of the City Council on the record as it stands. If this is a distinction, however, it is one far too subtle to make a difference. The CHA is guilty of creating the imbalance; the City Council is guilty of maintaining it without justification and in derogation of a court decree aimed at rectifying the problem." 480 F. 2d at 216 n. 4.

This Court has never held that the equal protection of the laws is denied by the failure of a municipality to alleviate "racial imbalance" in public housing sites, even where the municipality has not been shown to be otherwise guilty of a constitutional violation. The result of this new affirmative duty is seriously to undermine an important national policy with respect to housing and urban renewal.

Public housing has, from its beginnings, been closely tied to urban renewal. The declaration of policy that prefaces the federal Housing Act of 1937 states that its purpose is

> "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . ." 42 U. S. C. § 1401.

Almost two-thirds of the City of Chicago is included within the Limited Public Housing Area. As might be expected it is within that same area that most of the slum clearance has been carried out. That has been where most of the "unsafe and insanitary housing" in the City has been found. One witness testified in the district court that of the land owned by the City, acquired through demolition proceedings, ninety-eight percent of the total were located within the Limited Public Housing Area. When aging buildings succumb to blight, they are only rarely rehabilitated, due to extremely high costs. As a result, they must generally be demolished to avoid the danger of fire or other injury. Increasingly, buildings which no longer provide an adequate return on investment have been abandoned or transferred to public ownership in satisfaction of real estate tax liability. They, too, are inevitably demolished. The result has

been a steady attrition in the housing supply for low-income families, creating a shortage that has become critical.

In addition to its obvious contribution to the supply of housing, particularly low-income housing, public housing has a less tangible, but nonetheless significant and valuable effect in stabilizing a deteriorating area. Urban renewal demolition may wipe out the most pervasive pockets of blight, but it cannot halt the cancerous spread of that blight unless the vacant wastelands caused by demolition are redeveloped. One possible source of development is private investment. But experience has proven that few investors are willing to risk capital in the inner city. The alternative has been public investment, largely in the form of housing. The land is cheap; its use means that other, revenue-productive, land need not be retired so as to constrict further the real property tax base. The new construction improves the neighborhood and tends to lessen the burden of use on older buildings in the area. It thus tends also to halt the decline of the neighborhood.

Nevertheless, in the judgment of the courts below, "benign" considerations are to be ignored since the statistics indicate that too much housing is constructed in neighborhoods with a high black population. The Constitution forbids it, it is asserted, and commands the dispersal of blacks. This means, of course, that vast areas of the inner city must remain vacant and thus contribute to further decline in contiguous areas for, under the order entered by the district court on July 1, 1969, no public housing may be erected in the Limited Area (which encompasses the inner city) until 700 units are first built in the General Area, and thereafter only on a 1-to-3 basis, one unit in the Limited Area for each additional three units in the General Area. Furthermore, the Housing and Urban Development Act of 1968 (42 U. S. C. § 1455(f)) requires that at least 20 percent of new housing built in urban renewal projects must be for low-income families. That 20 percent can, under the district court's order, be built only if three times that number is constructed in the General Housing Area.

And not only must the available land thus remain indefinitely vacant, contributing to the further erosion of the inner city, but it must be replaced by land which must be purchased or acquired by condemnation (as opposed to the available, free, inner-city land), land which is revenue productive but which will become largely unproductive under public ownership. It may be noted that since sites have been selected in the General Housing Area at the direction of the district court, the United States Department of Housing and Urban Development (which provides the federal funding for public housing) has disapproved *all* CHA requests for contract awards because construction costs for dwellings and equipment exceed HUD's prototype limits. There has been, as a result, virtually no new family public housing in Chicago since 1969.

The new affirmative duty to alleviate racial imbalance in public housing sites also has an adverse impact upon the important federal policy implemented by the Model Cities Program. This program (42 U. S. C. §§ 3301 et seq.) finances a broad range of social service projects including, for example, health care, child care, and education. Its avowed purpose is the rebuilding of the inner city. Obviously, to the extent that reconstruction of housing in Model Cities areas lying within the Limited Housing Area is restricted, that program's effectiveness is correspondingly blunted. As a result of the affirmative duty, it is contended that "benign" considerations the petitioners might have are irrelevant in determining whether a program is constitutional. The district court's view is that a high statistical correlation between public housing sites and predominantly black residential areas is sufficient to prove "a deliberate policy to confine public housing" (296 F. Supp. at 910) to those areas. Together these positions raise the question of whether "benign" efforts to provide aid which will be generally available to a minority group can ever be considered constitutional.

Another difficulty which must affect the quantity of housing arises out of the federal structure for financing the construction

of public housing. Under federal law, each federally financed public housing unit must be included in a cooperation agreement with the local government involved, 42 U. S. C. § 1415(7). This is, says the Housing Act of 1937 (*ibid.*), "[i]n recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise. . . ." Before enactment of the Illinois statute authorizing local government approval of land acquisition (Ill. Rev. Stat. 1971, Ch. 67½, Par. 9), each new public housing project in the City of Chicago required either a new cooperation agreement or a specific addition to the existing cooperation agreement. The state statute, passed in 1949, made it possible for the City and the CHA to enter into a blanket cooperation agreement which did not have to be amended or added to every time a new project was begun. As a result, there is a serious question as to whether the existing blanket cooperation agreement between CHA and the City, entered into only because of the existence of the state statute set aside by the district court, remains valid. The United States Department of Housing and Urban Development's regional counsel has indicated that the by-passing of the City Council may present difficulties in obtaining the required approval of bond counsel.

Further, as this Court has observed, "the building of federally financed low-cost housing entails costs to the local community." *James* v. *Valtierra*, 402 U. S. 137, 141 n. 4. One cost results from 42 U. S. C. § 1411(f) which provides that capital grants by the federal government can be made only if the local government makes a contribution "in an amount not less than 20 percentum of [a low-rent-housing project's] development or acquisition cost." Given limited local government resources, it is therefore a necessary result of an affirmative duty to alleviate racial imbalance in housing sites that quantity of housing must decline as the expenses of development or acquisition increase.

The opinions of the Court of Appeals, explicitly and implicitly, thus impose an affirmative duty outside the context of a

constitutional violation that runs counter to national housing policy. It also runs counter to this Court's expressed view that

> "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Jefferson* v. *Hackney*, 406 U. S. 535, 32 L. Ed. 2d 285, 296 (1972).

Because of the impact that the new concept of an affirmative duty will have on an important national policy and the effect upon the supply of low-income housing, it is respectfully urged that this Court grant this petition for writ of certiorari to review the judgment below.

II.

THE JUDGMENTS BELOW CONFLICT WITH THIS COURT'S RULING IN JAMES v. VALTIERRA, 402 U. S. 137 (1971).

Citing *Hunter* v. *Erickson*, 393 U. S. 385 (1969) and *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), the Court of Appeals rejected petitioners' contention that this case is governed by *James* v. *Valtierra*, 402 U. S. 137 (1971). In *James*, appellees attacked a California referendum requirement for low-income public housing by arguing that

> "While the Justices have sometimes disagreed as to whether it [residential segregation] is legally curable in its purely private form . . . there has never been a question that its legitimation by any form of governmental authority is unconstitutional. [Citing, *inter alia*, *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907, 304 F. Supp. 736 (N. D. Ill. 1969)]" Brief of Appellees Anita Valtierra et al., p. 63, U. S. Supreme Court, October Term 1970, Nos. 154, 226.

It was also argued to this Court, again citing earlier opinions in the instant case, that

> "The unequal burden of Article 34 is but one aspect of a pervasive pattern of racial discrimination. This pattern perpetuates residential segregation and discriminatorily denies to minorities a wide range of opportunities." Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., *Ibid.*, pp. 26-28.

Moreover, the record in *James* was filled with affidavits of individuals asserting that the motive behind the failure of the referendums was racial (Appendix, *James* v. *Valtierra*, pp. 122-155). For example, in a manner virtually identical to the instant case, the executive director of the San Mateo Housing Authority stated in an affidavit:

> "It is the belief of the affiant that fear by middle and above income residents of a devaluation of property, coupled with social fears of minority and low-income family influx, preempts a possibility of a successful referendum." *Ibid.*, p. 122.

Yet notwithstanding this sort of evidence, Mr. Justice Black, writing for the Court, wrote that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." 402 U. S. at 141. And despite the allegations and affidavits as supporting "proof" of discrimination, even those Justices who dissented from the Court's judgment did not do so on the ground of racial discrimination.

The decision below conflicts as well with decisions of the Courts of Appeals for the Sixth and Ninth Circuits. In *Ranjel* v. *City of Lansing*, 417 F. 2d 321 (6 Cir. 1969), *cert. den.* 397 U. S. 980 (1970), a suit was brought by blacks and Mexican-Americans to enjoin a referendum on a "spot" zoning ordinance enacted by the city council to rezone a site in a one-family residence district so as to permit construction of low-rent townhouse and elderly units. The district court enjoined a referendum on the ordinance, and the Sixth Circuit reversed, noting that

> "In holding that the referendum was motivated by racial factors, the District Court necessarily had to reach that conclusion by searching the minds of 15% of the electorate who signed the referendum petition, and the remaining 85% who were enjoined from voting, none of whom were called as witnesses to testify in the case." 417 F. 2d at 323.

Similarly, in *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F. 2d 291 (9 Cir. 1970), plaintiffs sought to set aside a referendum that had overturned an ordinance rezoning a single-family district to permit development of federally financed low-income multifamily housing. Denying relief, the court of appeals answered plaintiffs' contention that the purpose of the referendum was to discriminate racially by commenting that

> "many environmental and social values are involved in determinations of land use. As the District Court noted, '* * * [T]here is no more reason to find that [rejection of rezoning] was done on the ground of invidious racial discrimination any more than on perfectly legitimate environmental grounds which are always and necessarily involved in zoning issues.' " 424 F. 2d at 295.

Here, as in the referendum cases, intention to discriminate is predicated upon an assessment of public opinion (*James* and *Ranjel*); here, as in the referendum cases, there are considerations that validly support a requirement for some form of public approval (*James*: local expenditures, tax revenues, public services; *Southern Alameda*: environmental and social values). Thus the instant case is identical in all essential ways with conflicting cases, particularly *James*, and it is respectfully requested that this Court grant this petition in order to review the conflict.

III.

BY JOINING THE PETITIONERS AS DEFENDANTS FOR THE PURPOSE OF RELIEF, AFTER ESTABLISHING THE LIABILITY OF A SEPARATE PARTY, WITHOUT A FINDING THAT PETITIONERS HAVE COMMITTED A CONSTITUTIONAL VIOLATION AND WITHOUT A FINDING THAT PETITIONERS' LEGISLATIVE GOALS IN LOCATING PUBLIC HOUSING ARE UNCONSTITUTIONAL, THE COURTS BELOW HAVE SUFFICIENTLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THIS IMPORTANT CASE TO REQUIRE THIS COURT TO EXERCISE ITS SUPERVISORY POWERS OVER THE INFERIOR FEDERAL COURTS.

Until the filing of the supplemental complaint on February 1, 1972, some three years after entry of the judgment order, the City of Chicago, Richard J. Daley, and the Members of the City Council of the City of Chicago ("City petitioners"), were not parties to this suit. They have never been charged with a violation of the constitutional or civil rights of the respondents. Nor have they, of course, been permitted to contest the assumption that they have in some way participated in depriving the respondents of some right. Indeed, under respondents' theory of the case, none of this is necessary, a position accepted by the concurring judge below. The other judge in the majority, however, went upon a different theory (thus introducing even more confusion into the operations of housing authorities and their administration of housing policy). "The City Council," he wrote, "by its earlier discriminatory action and later by its inaction has made itself a party to the discrimination 'as a joint participant.' *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961)." 480 F. 2d at 214. That conclusion of law is insupportable.

"It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service

of process. . . . The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Zenith Radio Corporation* v. *Hazeltine Research*, 395 U. S. 100, 110 (1969).

Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction

> "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

It is clear that the City petitioners are not in privity with the Chicago Housing Authority, the only defendant at the time the original finding of liability was made. The City petitioners are not represented by CHA, are not subject to its control, and are not "identified with them in interest." Indeed, the City petitioners have responsibilities far broader than simply that of providing low-income housing. Finally, there is no evidence that the City petitioners were "in active concert or participation" with CHA, as the district court's memorandum opinion of February 10, 1969, concedes, and the concurring judge points out.

Apart from the classic unfairness resulting from the willingness of the court below to enmesh the City petitioners in a prior, *ex parte*, finding of liability, the very lack of a disposition without an adversary hearing establishing both a violation and proper liability indicates a disregard of the truth-finding function of the adversary process. As a result, there was no consideration of any of the questions concerning the adequacy of the naked statistical argument upon which the entire cause is based. In another case relying on such a "naked statistical argument", one in which it was shown both that a larger percentage of blacks received aid to dependent children and that that program was funded at a

lower level than other programs without a disproportionate number of blacks, this Court observed that

> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult programs posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." *Jefferson* v. *Hackney*, 406 U. S. 535, 32 L. Ed. 2d 285, 297 (1972).

Implicit in the *ex parte* finding of discrimination is the assumption that public housing, if it were principally occupied by white tenants, would be constructed in white neighborhoods, an assumption not supported by the record. The only clear fact emerging is that a public welfare program is maintained that disproportionately is employed by blacks. To conclude, as do the courts below, that this demonstrates invidious discrimination is an exercise in Orwellian logic. It is a conclusion that might have been avoided had a truly adversary proceeding been used to test the decisive, but unstated, assumptions of racial prejudice. The courts below have thus indulged in a denial of due process of law in establishing jurisdiction over petitioners, one that sufficiently departs from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory powers.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

DOROTHY GAUTREAUX et al.,
Plaintiffs-Appellees,

vs.

CITY OF CHICAGO and RICHARD J. DALEY,
Defendants-Appellants,

vs.

FRED B. ROTI et al., Members of the City Council of the City of Chicago,
Defendants-Appellants,

vs.

EDWARD R. VRDOLYAK,
Defendant-Appellant,

vs.

CHICAGO HOUSING AUTHORITY,
Defendant-Appellant.

Nos. 72-1409, 72-1410, 72-1485 and 72-1486.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 12, 1973.

Decided May 18, 1973.

Before SWYGERT, *Chief Judge,* and PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.*

This chapter in a long unfinished story deals with the power and propriety of the district court's implementation of prior judgments which were designed to alleviate racial discrimination

in site selection and tenant assignment procedures in public housing, by restructuring the local decision-making process in order to bypass a discriminatory bottleneck in that process.

I.

The facts of this case have been recited so often that a brief summary will suffice at this juncture. Black tenants in and applicants for public housing brought suit in 1966 against the Chicago Housing Authority (CHA) and others challenging the constitutionality of CHA's site selection policy. Preliminary motions by the defendants to dismiss and for summary judgment were disposed of in 1967. D. C., 265 F. Supp. 582. Plaintiffs' motion for summary judgment, on the other hand, was granted in 1969. D. C., 296 F. Supp. 907. That judgment was implemented later in the year by entry of an order which comprised a comprehensive plan for site selection. D. C., 304 F. Supp. 736. CHA submitted no sites for family dwelling units to the City Council of Chicago for approval and consequently the prior orders were further implemented in 1970 by a timetable and deadline order, which was affirmed by this court in Gautreaux v. Chicago Housing Authority, 436 F. 2d 306 (7th Cir. 1970), cert. denied, 402 U. S. 922, 91 S. Ct. 1378, 28 L. Ed. 2d 661 (1971).

The same plaintiffs, simultaneously with the filing of the CHA complaint in 1966, also filed another complaint against the Secretary of the Department of Housing and Urban Development (HUD) seeking declaratory and injunctive relief. The district court dismissed all four counts of the complaint but this Court reversed that judgment as to two counts, holding that HUD had violated the due process clause of the Fifth Amendment by assisting in carrying on a racially discriminatory public housing system in the Chicago area and entitling the plaintiffs to summary judgment. Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971).

While the CHA and HUD cases were resulting in determinations that both agencies were guilty of unconstitutional racial discrimination in public housing site selection, HUD was approving annual money grants to the City of Chicago under the Model Cities Program established by the Demonstration Cities and Metropolitan Development Act of 1966 (42 U. S. C. § 3301 ff.). The first year grant of $38 million was paid by HUD to Chicago but in 1971 the district court enjoined HUD from paying any second-year Model Cities Program money unless and until at least 700 dwelling units in white areas had received City Council approval. D. C., 332 F. Supp. 366. This order was reversed and remanded by this court with one judge dissenting. Gautreaux v. Romney, 457 F. 2d 124 (7th Cir. 1972).

On April 10, 1972, the district court found, among other things, that acquisition of sites by CHA is necessary to enable CHA to comply with the 1969 judgment order to increase the supply of dwelling units as rapidly as possible; that under state law (Ill. Rev. Stat. ch. 67½, § 9) CHA may not acquire sites without City Council approval; that there was no showing of any necessity or reason for the failure of the City Council to take any action since July 1, 1971 to approve any acquisitions of proposed sites, particularly in light of the evidence that many of the sites were suitable for the provision of dwelling units; and that such failure had had the effect of preventing CHA from complying with the 1969 judgment order and of preventing the Court from assuring that relief to which the plaintiffs were entitled was provided. The Court ordered that until further order the statute requiring City Council approval of CHA sites shall not be applicable to CHA's actions taken for the purpose of providing dwelling units and directed CHA to proceed with appropriate steps to provide the 1500 dwelling units that were the subject of the District Court's July 20, 1970 and subsequent orders. 342 F. Supp. 827.

Appeals were taken by the City, the Mayor, CHA and 39 of the 48 aldermanic defendants. Five of the nonappealing

aldermanic defendants (Aldermen Cousins, Despres, Langford, Simpson and Singer) admitted all allegations of the supplemental complaint involved here, took the position in the court below that they "fully support the efforts being made by the plaintiffs" and unsuccessfully sought leave to file a brief on this appeal in support of the order entered below. Four others (Aldermen Hedlund, Hoellen, Lawlor and Simon) have likewise not appealed. In addition, Alderman Holman, who is one of the appellants, while dissatisfied with the provisions of the 1969 judgment order, said,

> "I would say that the Court enter an order that whether we have City Council approval or not, that we proceed . . . . The prayer to by-pass the City Council is one for the Court's suggestion, and I do not quarrel with it . . . ."

HUD has not appealed. In its answer to the supplemental complaint HUD said:

> "[HUD] suggests that the inclusion of the City of Chicago, Richard J. Daley, Mayor of the City of Chicago, and individual members of the City Council, as defendants herein, is appropriate to achieve just and equitable relief and urges this Court to enter such order or orders against the aforesaid defendants as this court deems just and equitable."

The City, Mayor and appellant aldermen have contended (1) that it was improper to join them as parties-defendants for purposes of relief inasmuch as they have not been found to have violated any of plaintiffs' rights nor have their objectives in the location of public housing been found to be unconstitutional; (2) that the City Council's authority to approve public housing sites does not deny plaintiffs any relief to which they are entitled; and (3) that both the order appealed from and the original 1969 judgment constitute abuses of discretion because of the hardships they introduce.

CHA has contended that the order is an abuse of discretion because it "promises to do nothing but add to CHA's already awesome burdens while contributing nothing to the complex

problem of providing integrated public housing opportunities in the Chicago area."

II.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971).

It has long been conclusively established in this case (1) that "plaintiffs, as present and future users of the system, have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves," 265 F. Supp. 582, 583; (2) that CHA had violated the Fourteenth Amendment by intentionally choosing sites for family public housing and adopting tenant assignment procedures for the purpose of maintaining existing patterns of residential separation of races, 296 F. Supp. 907, enforced by 304 F. Supp. 736, affirmed in 436 F. 2d 306 (7th Cir. 1970), cert. denied, 402 U. S. 922, 91 C. Ct. 1378, 28 L. Ed. 2d 661 (1971); and (3) that HUD had violated the due process clause of the Fifth Amendment by its knowing acquiescence in CHA's discriminatory housing program. 448 F. 2d 731 (7th Cir. 1971).

The rights and violations are firmly established and are far beyond appeal or dispute. What remains is the district court's task "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U. S. at 16, 91 S. Ct. at 1276. This has proved to be a Herculean task requiring both the wisdom of Solomon and the patience of Job. *See* Gautreaux v. Romney, 457 F. 2d 124 (7th Cir. 1972) (court's opinion, 124-129, and dissent, 129-140).

As early as in his opinion of Feberuary ??, 1969, supporting an order of the same date, the district court found that:

> "CHA follows an unvarying policy 'based upon actual experience in submitting sites to the City Council for approval' of informally clearing each site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman." 296 F. Supp. at 913.

The court further found (at 914):

> "It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes.
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> * * * * *
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> "CHA finally contends that the impulse originating and sustaining the policy against choosing White sites came from the City Council. But by incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate. It is no defense that the City Council's power to approve sites may as a matter of practical politics have compelled CHA to adopt the pre-clearance procedure which was known by CHA to incorporate a racial veto. . . . Although neither the City Council nor its members individually are parties to this suit, they will be bound by any order entered in this case against CHA of which they have actual notice. FRCP 65(d)."

There was no appeal from these findings and conclusions and they became final. A supplemental complaint was filed by the plaintiffs on February 2, 1972, naming the Mayor and members of the City Council as parties-defendant. Answers were filed by the defendants and a hearing was held on the supplemental complaint, commencing April 4, 1972.

No evidence was offered at the hearing by the defendants to explain why neither the Planning and Housing Committee nor the City Council itself had given any consideration to the available CHA sites since July 1, 1971. Alderman Kelley, the only alderman called as a witness by the City, said under cross-examination that he had not discussed that subject with his fellow aldermen. Alderman Holman, testifying in his own behalf, was asked on cross-examination for his opinion as to why the committee had taken no action on CHA sites since July 1, 1971. He said he could not give an opinion, but then added:

> "I don't think you could get, right now, an affirmative 26 votes [a majority of the council] to put that many housing units in white neighborhoods."

Alderman Simon regretted that the Committee hearings did not continue and said that the Council did a "great disservice" by not continuing with them. HUD called the "refusal" to hold further hearings "a deliberate affront to this [the district] court," and "totally contrary" to representations made by the City in the May 12, 1971 Letter of Intent signed by the City, CHA and HUD. See Gautreaux v. Romney, *supra*, 457 F. 2d at 132.

A witness for the City, who was an assistant commissioner of the City's Department of Development and Planning (DDP), testified about an examination he and his staff had made of some (but not all) of the remaining CHA sites. Contrary to the City's statement that all of these sites "were shown to be in violation of the Chicago Zoning Ordinance, or otherwise burdensome upon public services, including school attendance," the evidence showed that the DDP staff found over 100 of them to be "suitable sites in the General Public Housing Area." However, neither this nor any other information or recommendation concerning the remaining CHA proposed sites was submitted by the DDP to the Chicago Plan Commission, the agency to which the DDP normally made its recommendations. No explanation was given as to why that had not been done. At the

conclusion of the hearing, on April 10, 1972, the order now appealed from was entered.

The order found that pursuant to prior order of the Court, CHA submitted on March 5, 1971 to the defendant members of the City Council proposed sites for not fewer than 1500 dwelling units; that since July 1, 1971, neither the City nor the Council has approved the acquisition of any property by CHA for dwelling units; that many of the sites for the 1500 units are suitable for dwelling units; and that such failure to conduct hearings and approve acquisition has the effect of preventing CHA from providing additional Dwelling Units in conformity with the Judgment Order, thereby denying relief to the plaintiffs to which they are entitled and frustrating and preventing the Court from assuring that such relief is provided.

The order included the following remedial provision:

> "Until the further order of this Court the following provision of Section 9, Chapter 67½, Illinois Revised Statutes, to wit:
>
> > 'If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the govening body of the municipality has approved the acquisition thereof by the housing authority'
>
> shall not be applicable to CHA's actions, including without limitation the acquisition of real property in the City of Chicago, taken for the purpose of providing Dwelling Units."

The district court had undoubted power to suspend the operation of the state statute,[1] "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees." North Carolina State Board of Education v. Swann, 402 U. S. 43, 45, 91 S. Ct. 1284, 1286, 28 L. Ed. 2d 586 (1971).

In its February 10, 1969 opinion, the district court concluded (296 F. Supp. at 912):

> "No criterion, other than race, can plausibly explain the veto of over 99½% of the housing units located on the White sites which were initially selected on the basis of CHA's expert judgment and at the same time the rejection of only 10% or so of the units on negro sites."

Subsequently, of course, virtually no action was taken on any sites after the court fixed definite formulae for requiring at least 75% of dwelling units to be constructed in predominantly white areas.

The City Council by its earlier discriminatory action and later by its inaction has made itself a party to the discrimination "as a joint participant." Burton v. Wilmington Parking Authority, 365 U. S. 715, 725, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). In Louisiana v. United States, 380 U. S. 145, 156, 85 S. Ct. 817, 823, 13 L. Ed. 2d 709 (1965), the Supreme Court held that the "need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminary practices shown to be so deeply engrained in the [state] laws, policies, and traditions . . . completely justified the District Court" in suspending the operation of state constitutional provisions in 21 parishes until voter discrimination had been remedied. In Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967), the Court approved the action of

1. Inasmuch as the statute involved is not of state-wide application but relates solely to the affairs of one county in the state, it was not necessary to convene a three-judge court pursuant to 28 U. S. C. § 2281. Moody v. Flowers, 387 U. S. 97, 101-102, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967). None of the parties has raised this issue.

the Supreme Counrt of California in striking down a provision of the state constitution because it involved the state in racial discrimination in the housing market.

In Hunter v. Erickson, 393 U. S. 385, 386, 393, 89 S. Ct. 557, 558, 562, 21 L. Ed. 2d 616 (1969), the Court said that "amending the city charter [of the City of Akron, Ohio] to prevent the city council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of the majority of the voters of Akron . . . discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws."

In Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F. 2d 108 (2d Cir. 1970), cert. denied, 401 U. S. 1010, 91 S. Ct. 1256, 28 L. Ed. 2d 546 (1971), the Court of Appeals, speaking through Mr. Justice Clark, sitting by designation, affirmed the district court's judgment requiring the city to take all necessary steps to enable the plaintiff to proceed with its low income housing project where the city had previously declared a moratorium on new subdivisions.[2]

In Hawkins v. Town of Shaw, 461 F. 2d 1171 (5th Cir. 1972), the Fifth Circuit sitting *en banc* in a case requiring the town to submit a plan for the court's approval to cure the results of a long history of discrimination (437 F. 2d 1286) said at 1172:

> "In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials. . . . '[W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to provide rights and to public interest as the perversity of a willful scheme.' "

2. See also Crow v. Brown, 332 F. Supp. 382 (N. D. Ga. 1971), affirmed, 457 F. 2d 788 (5th Cir. 1972) (county enjoined from interfering with public housing by refusing building permits); Dailey v. City of Lawton, 425 F. 2d 1037 (10th Cir. 1970) (city enjoined from denying building permits for construction of low-income housing).

The action of the district court in the circumstances of this case was within the range of its discretion. The defendants rely upon James v. Valtierra, 402 U. S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971), where the Court held that the California procedure for mandatory referendums, which was not limited to proposals involving low-cost public housing, did not violate the Equal Protection Clause. There the Court held that "the record . . . would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." 402 U. S. at 141, 91 S. Ct. at 1333. Here the record supports the trial court's conclusion that only race can explain the defendants' actions and subsequent inaction.[3]

Upon this record, the defendants were properly made parties-defendant and the trial court did not abuse its discretion in fashioning a remedy.[4] Inasmuch as that remedy facilitates CHA's compliance with the 1969 judgment order, CHA's burdens are eased rather than further laden.

The judgment order of April 10, 1972 is affirmed.

Affirmed.

SWYGERT, *Chief Judge* (concurring).

Judge Sprecher holds the City Council to be a "joint participant" in active racial discrimination earlier practiced by the CHA. Like Judge Pell, I cannot agree. The trial judge made no finding of joint participation. He can hardly be blamed; the plaintiffs made no mention of active joint participation at trial, and the record contains little, if any, support for a finding of discrimination by the City Council. Nor may reliance be placed on the findings made by the trial judge before the Council was

3. See generally, Murasky, "James v. Valtierra: Housing Discrimination by Referendum?," 39 U. of Chi. L. Rev. 115 (1971); Reach, "The Application of the Equal Protection Clause to Referendum-Made Law: James v. Valtierra," 1972 U. of Ill. L. Forum 408 (1972).

4. See Recent Cases, Gautreaux v. Romney, 86 Harv. L. Rev. 427, 437-38 (1972).

made a party to this suit by supplemental complaint. The Council was not in privity with CHA, and I do not understand plaintiffs so to contend. *See* Rule 65(d), F. R. Civ. P. Finally, the plaintiffs do not raise a theory of joint participation on this appeal. Their legal theory of liability requires no connection of the Council with CHA and no finding of active discrimination on the part of the Council. I concur for that reason.

It is today well established that the failure of a municipality to alleviate racial imbalance in housing may be as grievous a violation of the equal protection clause as is direct action by a public body to advance discrimination among the races.[1] In both situations courts have saddled an offending party with the burden of demonstrating that a compelling governmental interest underlay the omission or commission, once a discriminatory effect thereof is shown inferentially or statistically by the complaining party.[2]

In this case, the inaction of the City Council had the effect of denying to plaintiffs the relief granted them when the district court first heard the cause.[3] The Council by its delay perpetuated a racially unbalanced distribution of public housing in the City of Chicago.[4] And it did so without apparent reason; the

1. Banks v. Perk, 341 F. Supp. 1175, 1182 (N. D. Ohio 1972); Sisters of Prov. v. City of Evanston, 335 F. Supp. 396, 403-405 (N. D. Ill. 1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 696-697 (W. D. N. Y. 1970), aff'd 436 F. 2d 108 (2d Cir. 1970); see Crow v. Brown, 332 F. Supp. 382, 390-391 (N. D. Ga. 1971), aff'd 457 F. 2d 788 (5th Cir. 1972); cf. Davis v. School District, City of Pontiac, Inc., 309 F. Supp. 734, 741-742 (E. D. Mich. 1970).

2. Crow v. Brown, 332 F. Supp. 382, 391 (N. D. Ga. 1971), aff'd 457 F. 2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F. 2d 108, 114 (2d Cir. 1970); *cf.* Banks v. Perk, 341 F. Supp. 1175 (N. D. Ohio 1971); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N. D. Ill. 1969).

3. Finding H, Gautreaux v. City of Chicago, (N. D. Ill., April 10, 1972).

4. Cases such as *Crow* or *Kennedy Park Homes*, note 2, *supra*, differ factually in that the acts and omissions of the enjoined governmental entity were the direct cause of racially imbalanced housing con-

district judge found, and I agree, that the Council had shown no "supervening necessity . . . or indeed [made] any showing of any necessity or reason at all" for its failure to pass on CHA site submittals.[5] Not even a rational basis was advanced by the Council for its neglect, much less a compelling governmental interest. The Council is liable, then, for its delay. The only question remaining is one of remedy.

Other than his objection to Judge Sprecher's finding of "active participant" status for the City Council, Judge Pell appears to object to the form of remedy granted by the district judge. He would prefer, I think, a mandate directing the City Council to pass upon CHA submittals rather than the extant order requiring CHA to ignore Ill. Rev. Stat., ch. 67½, § 9 (1971), termed the "easier route" by Judge Pell. In support, he notes that the City Council is concerned with and retains control of city-wide planning and the zoning power, as well as the authority to control CHA by withholding funds or by cooperative agreement. 42 U. S. C. §§ 1411(f), 1415(7) (1964). He points out, in addition, that the instant order might give pause to bond counsel, who approach the task of approving bond issues with "hypertechnical scrutiny."

I am not persuaded by these objections. The fact that the City Council retains considerable control over construction by CHA vitiates the argument advanced by the Council that it is somehow deprived of its important discretion to locate public housing with due regard to factors such as population density, environmental control and the provision of public services. Though it may indeed be true that the order at issue "will solve

ditions. As I have noted, the same cannot be said of the City Council on the record as it stands. If this is a distinction, however, it is one far too subtle to make a difference. The CHA is guilty of creating the imbalance; the City Council is guilty of maintaining it without justification and in derogation of a court decree aimed at rectifying the problem.

5. Finding G, Gautreaux v. City of Chicago (N. D. Ill. April 10, 1972).

no problems," as the CHA contends, it is also possible that the City, by reason of the district court's order, will move speedily in all areas to assure a balanced placement of badly needed public housing. In any event, the Council has not yet moved to limit the CHA by exercise of its powers under federal law, and no order directed to those functions would now be appropriate. As the progress of litigation in the school desegregation cases has taught, remedy of discriminatory conditions is necessarily a step-by-step proposition. That further injunctive relief may be needed in this matter at some later date is no reason to deny the relief presently sought. As to the supposed recalcitrance of bond counsel, I find this too speculative to justify a denial of relief at this time. If the problem turns out to be one on insurmountable magnitude, the district court retains jurisdiction to modify its decree.

PELL, *Circuit Judge* (dissenting).

The majority opinion of this court affirms an order of the district court entered April 10, 1972, directing the Chicago Housing Authority to ignore a provision of the statutes of the State of Illinois which requires the approval, prior to CHA's acquisition of real property, of "the governing body of the municipality" involved. I respectfully dissent.

My dissent in no way records disagreement with the underlying objective of the district court which obviously is to eliminate racial discrimination violative of the Constitution from the program of housing carried out under the CHA aegis. My thinking on the score is no different today than it was when I concurred in the majority opinion of this court in Gautreaux v. Chicago Housing Authority, 436 F. 2d 306 (7th Cir. 1970), cert. denied, 402 U. S. 922, 91 S. Ct. 1378, 28 L. Ed. 2d 661 (1971), (*Gautreaux* I). Likewise I do not intend to suggest any lack of sympathy for or understanding of the difficulties that have beset the district court's continuing efforts to accomplish the stated objective.

I cannot conceive, however, that the due processes of the law should be abrogated by virtue of either commendable objective or difficulty of attainment. This court has in effect recognized this principle in one phase of the present litigation by reversing an order of the district court enjoining HUD from dispensing essentially nonrelated federal funds unless the city complied with certain stated conditions, the admitted purpose of which was to compel the city to approve CHA housing sites. Gautreaux v. Romney, 457 F. 2d 124 (7th Cir. 1972). (*Gautreaux* III). This decision followed the mandate of this court in *Gautreaux* II (Gautreaux v. Romney, 448 F. 2d 731 (7th Cir. 1971)) in which this court found violations of plaintiffs' rights in federal and city programs for low-income public housing as made available to low-incomes families in Chicago. It is to be noted that Senior Judge Duffy was the author of all three of the *Gautreaux* opinions and that Chief Judge Swygert concurred in both II and III.

Subsequent to the issuance of the opinion in *Gautreaux* III, the district court entered its order of April 10, 1972, here under challenge.

It is with some regret that I conclude the district court has again pursued an improperly oblique course to realize the goal originally established by its order of February 10, 1969, Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N. D. Ill. 1969), which order was affirmed in *Gautreaux* I. At the time of the issuance of that order by the district court neither the City of Chicago nor any of its officials was a party to the suit. Nevertheless, the district court after so observing, stated, "they will be bound by any order entered in this case against CHA of which they have actual notice. FRCP 65(d)." 296 F. Supp. at 914.

Rule 65(d), however, quite explicitly states that injunctive orders shall be binding upon the "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in *active concert or participation* with them who

receive actual notice of the order by personal service or otherwise." At that time, there was no record establishment of active concert or participation which would catch Chicago or its officials in the binding effect net. Indeed, the court observed that there was no evidence that the aldermen who vetoed white sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of white neighborhoods. 296 F. Supp. at 914. The status of evidentiary proof of active concert or participation on the part of the city or its officials remains unchanged although they have now been made parties to the action. While their having been made parties could clearly subject them to the binding effect of an order, no order has been entered against the City of Chicago, its mayor, or any of its aldermen, all of whom were made parties by the supplemental complaint filed by the plaintiffs on February 1, 1972. In the supplemental complaint the plaintiffs did not charge the City defendants with a violation of their constitutional rights. It has not been asserted that said defendants' objectives in considering the location of public housing have been other than constitutional. No evidence was offered indicating that the City defendants have been in "active concert or participation" with other defendants who may have been found to violate rights claimed by the plaintiffs.

Nevertheless, the April 19, 1972 order takes the direction of mandating CHA to ignore the following provision of Ill. Rev. Stat. 1971, ch. 67½, § 9:

> "If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Fedthority until such time as the housing authority has advised eral census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority."

The quoted portion of Section 9 is merely one paragraph of the Housing and Redevelopment Act of the State of Illinois which deals with the acquisition of property and gives the Housing Authority the power of eminent domain. The legislature of Illinois has decreed that in cities having a population in excess of 500,000, consent must be obtained from the governing body of the municipality. This condition precedent to the exercise of the power of eminent domain is now ordered to be ignored by the Chicago Housing Authority.

If this were a case in which it was demonstrated that the portion of the statute was unconstitutional on its face, which is not even suggested as far as I can see, or in which the statute was proven to be unconstitutionally applied, the situation might now be different. These issues, however, are not confronted or apparently considered in the court's April 1972 order.

It is obvious, of course, that the present path is far easier than would be the route of establishing unconstitutional application The City Council, a legislative body, is concerned not simply with the operation of a public housing program, but it is also concerned, or should be concerned, with city-wide planning and zoning, with population density and environmental control, and with the provision of public services and the maintenance of a real estate tax basis adequate to support such services. These issues are troublesome and complex but in my opinion afford no excuse for taking the easier route of ordering CHA just to ignore the necessity of complying with the statute.

There is also no confrontation with the matter of financing the purchase of real estate, even if CHA did purport to exercise its eminent domain power without compliance with its enabling statute. The district court seems to be in essence saying go ahead and condemn irrespective of whether funds are available. Yet, 42 U. S. C. § 1411 (f) provides for a contribution by the state as a condition of a capital grant as follows:

> "No capital grant pursuant to this section shall be made for any low-rent-housing or slum-clearance project unless

> the public housing agency receiving such capital grant shall also receive, from the State, political subdivision thereof, or otherwise, a contribution for such project (in the form of cash, land, or the value, capitalized at the going Federal rate of interest, of community facilities or services for which a charge is usually made, or tax remissions or tax exemption) in an amount not less than 20 per centum of its development or acquisition cost."

Also, the district court order appears to ignore completely the federal statutory requirement for a cooperative agreement with the governing body of the locality involved. 42 U. S. C. § 1415 (7).

Although suggested by HUD in the court below, there is a complete disregard of the fact that financing is done by bonds. It needs no citation of authority to recognize that bonds disapproved by counsel will not sell and funds will not be raised. It is equally a matter of common knowledge that bond counsel traditionally approach approval of bond issues with what could be termed a hypertechnical scrutiny.

If the City authorities are in active concert and participation in implementing housing on an unconstitutional basis, then it appears to me that issue should be faced squarely and the accompanying problems should be the subject of scrutiny.

I recognize that the district court deemed itself to be engaged in a remedial process but it applied that remedial process by indirection to new parties without a sufficient foundation in the record. As Mr. Chief Justice Burger stated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 16, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554 (1971):

> "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation."

Here it appears to me that the judicial power of legislative excision is being exercised without the necessary foundation of a constitutional violation by the parties immediately affected.

I have the uncomfortable feeling on this record that because of the tribulations, which should not be minimized, of this litigation, the zeal of the plaintiffs and perhaps the frustrations which the district court has felt in the particular conurbation context in not being able to accomplish a commendable objective, this case has now been transformed from one involving unconstitutional implementation of the Federal Low-Rent Housing Act into a case of claimed unconstitutional deprivation of low-cost housing. However, absent constitutional mandate, the assurance of adequate housing is a legislative not a judicial function. Lindsey v. Normet, 405 U. S. 56, 74, 92 S. Ct. 862, L. Ed. 2d 36 (1972). The City Council of Chicago is a legislative body and it has the ultimate determination as to whether it should provide low-cost housing. It is only when it proceeds with low-cost housing in an unconstitutional manner that there should be judicial interference. Thus far there has been no judicial determination that the City is embarked upon such a course of interference. Without such a determination, the court should not order the legislative function of the City Council to be ignored.

Accordingly, I would reverse the order of the district court.

APPENDIX B.

DOROTHY GAUTREAUX ET AL.,
Plaintiffs,

vs.

CHICAGO HOUSING AUTHORITY ET AL.,
Defendants.

Nos. 66 C 1459, 66 C 1460.

United States District Court
N. D. Illinois E. D.

April 10, 1972.

ORDER.

AUSTIN, *District Judge.*

Previous stages of this litigation are described in D. C., 296 F. Supp. 907, D. C., 304 F. Supp. 736, 7th Cir., 436 F. 2d 306, and 7th Cir., 448 F. 2d 731. The stage now to be dealt with follows a trial held with respect to the supplemental complaint filed on February 2, 1972, and the pleadings and motions relating thereto, and a hearing respecting "Plan II" of defendant Chicago Housing Authority ("CHA"), filed on February 2, 1972, pursuant to this Court's order of January 3, 1972, such trial and hearing having been consolidated by previous order of this Court. The phrases "Dwelling Unit" and "General Public Housing Area" shall have the same meaning herein as in the Court's judgment order of July 1, 1969 ("Judgment Order"), 304 F. Supp. 736. Based on the pleadings and the evidence the Court makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT.

A. Pursuant to previous orders of this Court CHA is under a duty to use its best efforts to increase the supply of Dwelling Units in conformity with the Judgment Order as rapidly as possible.

B. To that end, and pursuant to orders of this Court, on March 5, 1971 CHA submitted to the defendant members of the City Council ("Council") of the defendant City of Chicago ("City"), and to the Chicago Plan Commission, an agency of the City, proposed sites for the provision of not fewer than 1500 Dwelling Units.

C. Acquisition of such sites or alternative sites by CHA is necessary to enable CHA to increase the supply of Dwelling Units in conformity with the Judgment Order as rapidly as possible.

D. Uuder the following provision of Section 9, Ch. 67½, Illinois Revised Statutes, CHA may not acquire real property until the acquisition thereof has been approved by the Council:

> "If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority."

E. On and prior to July 1, 1971, the City (through two of its agencies) and the Council approved the acquisition of certain real property by CHA which is presently sufficient to provide fewer than 200 Dwelling Units in conformity with the Judgment Order.

F. Since July 1, 1971, no committee of the Council has conducted hearings with respect to, and neither the City nor the Council has approved the acquisition of any real property by CHA for the purpose of providing Dwelling Units in conformity with the Judgment Order.

G. Such failure to conduct hearings and to approve any such acquisition since July 1, 1971 is unjustified, there having been no showing of supervening necessity therefor, or indeed any showing of any necessity or reason at all, and the evidence having shown that many of the sites referred to in paragraph B above are suitable for the provision of Dwelling Units.

H. Such failure to conduct hearings and approve acquisition has the effect of preventing CHA from providing additional Dwelling Units in conformity with the Judgment Order, thereby denying relief to the plaintiffs to which they are entitled and frustrating and preventing this Court from assuring that such relief is provided.

CONCLUSIONS OF LAW.

A. Under the evidence in this case, the effect of the failures of the City and Council since July 1, 1971 to approve any acquisition of real property by CHA for the purpose of providing additional Dwelling Units in conformity with the Judgment Order has been and continues to be to thwart the correction of federal constitutional wrongs. Such failures may not be permitted to thwart such correction. Crow v. Brown, 332 F. Supp. 382, 390-92 (N. D. Ga. 1971), and cases there cited: aff'd., 457 F. 2d 788 (5th Cir., 1972, No. 71-3466). The affirmative obligation to seek means of disestablishing state-imposed segregation must be shared by all agencies or agents of the state. Franklin v. Quitman County Board, 288 F. Supp. 509, 519 (N. D. Miss. 1968).

B. Under the evidence in this case, taken together and viewed in their historical context, such failures of the City and

the Council violate the rights of the plaintiffs and the class they represent under the equal protection clause of the Fourteenth Amendment to the United States Constitution. Crow v. Brown, *supra*, 332 F. Supp. at 392.

C. Under the evidence in this case, the effect of the operation of the foregoing provision of Section 9, Chapter 67½ Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from assuring that a full remedy is provided for the violations of federal constitutional rights which this Court's memorandum opinion of February 10, 1969 found to have occurred.

D. Under the evidence in this case, the Court has the power and duty to take appropriate action to provide such remedy notwithstanding the foregoing provision of Section 9, Chapter 67½, Illinois Revised Statutes, and notwithstanding such failures of the City and the Council. Louisiana v. United States, 380 U. S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965); Haney v. County Board of Education, 429 F. 2d 364 (8th Cir. 1970); United States v. Greenwood School District, 406 F. 2d 1086 (5th Cir. 1969); Bradley v. School Board, 324 F. Supp. 396 (E. D. Va. 1971); United States v. Texas, 321 F. Supp. 1043 (E. D. Tex. 1970); Burleson v. County Board, 308 F. Supp. 352 (E. D. Ark. 1970); Crow v. Brown, *supra;* Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W. D. N. Y.), aff'd., 436 F. 2d 108 (2d Cir. 1970); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F. 2d 291, 295-96 (9th Cir. 1970); Hawkins v. Town of Shaw, 437 F. 2d 1286, 1291-92 (5th Cir. 1971).

For the foregoing reasons it is hereby ordered:

1. The motions to dismiss the supplemental complaint and for jury trials be and the same hereby are denied.

2. Until the further order of this Court the following provision of Section 9, Chapter 67½, Illinois Revised Statutes, to wit:

> "If the area of operation of a housing authority includes a city, village or incorporated town having a population in excess of 500,000 as determined by the last preceding Federal census, no real property or interest in real property shall be acquired in such municipality by the housing authority until such time as the housing authority has advised the governing body of such municipality of the description of the real property, or interest therein, proposed to be acquired, and the governing body of the municipality has approved the acquisition thereof by the housing authority."

shall not be applicable to CHA's actions, including without limitation the acquisition of real property in the City of Chicago, taken for the purpose of providing Dwelling Units.

3A. Within 10 days from the date hereof the City shall file with the Court and serve upon Counsel for CHA, HUD and the plaintiffs the addresses of 106 sites referred to in plaintiff's Exhibit 8, the relevant page of which is attached hereto as Appendix 1.

3B. During the 20 days following such filing and service CHA shall receive, consider, and make available at its offices to the public for inspection, all comments from any source relating to such sites are submitted to it in writing.

3C. Within 10 days following the end of such 20 day comment period CHA shall file with the Court, and serve upon HUD and counsel for the plaintiffs, a final list of such of the sites served upon it by the City under paragraph 3A hereof as in the judgment of CHA, taking into consideration both the comments received under paragraph 3B hereof and the need to effectuate the previous orders of this Court, are appropriate for the provision of Dwelling Units pursuant to such previous orders.

3D. Immediately upon such filing and service pursuant to paragraph 3C hereof, CHA shall begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon, including without limitation, (a) the prep-

aration and submission of plans and proposals, including a so-called Development Plan, relating thereto to HUD, (b) the acquisition of such sites, regardless of any action taken or not taken by the Council with respect thereto, upon HUD's approval of such Development Plan, and (c) the provision of Dwelling Units thereon as promptly as may be.

4A. Within 15 days from the date hereof the City shall deliver to CHA a list of all the vacant, residentially zoned parcels of land in the General Public Housing Area of the City of which it has knowledge.

4B. Within 70 days from the date hereof CHA shall file with the Court and serve upon counsel for HUD, the City and the plaintiffs, a list of such sites as will in the judgment of CHA, when added to the sites approved by the Council in June, 1971, and the sites referred to in paragraph 3C hereof, be sufficient for the provision of an aggregate of 1500 Dwelling Units in conformity with the Judgment Order.

4C. During the 30 days following such filing and service CHA shall receive, consider and make available as its offices to the public for inspection, all comments from any source relating to such sites as are submitted to it in writing.

4D. Within 20 days following the end of such 30 day comment period CHA shall file with the Court and serve upon HUD and counsel for the plaintiffs a final list of such of the sites referred to in paragraph 4B hereof as in the judgment of CHA, taking into consideration both the comments received under paragraph 4C hereof and the need to effectuate the previous orders of this Court, are appropriate for the provision of the aggregate of 1500 Dwelling Units referred to in paragraph 4B hereof.

4E. Immediately upon such filing and service pursuant to paragraph 4D hereof, CHA shall begin all steps and procedures necessary or appropriate to acquire such sites and provide Dwelling Units thereon, including without limitation, (a) the

preparation and submission of plans and proposals, including a socalled Development Plan, relating thereto to HUD, (b) the acquisition of such sites, regardless of any action taken or not taken by the Council with respect thereto, upon HUD's approval of such Development Plan, and (c) the provision of Dwelling Units thereon as promptly as may be.

5. The Court retains jursidiction over this matter for the entry of such further orders as may be appropriate to effectuate the provisions of this order or otherwise.

CERTIFICATION UNDER
RULE 54 (b).

With respect to the foregoing order it is hereby certified in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure,

(a) That the Court has directed the entry of a final judgment respecting a claim for relief under the supplemental complaint; and

(b) That the Court has determined that there is no just reason for delay.

APPENDIX 1

STATUS REPORT

Original 275 CHA Low-Income Housing Sites

In March of 1971 the Chicago Housing Authority submitted to the City Council a list of 275 sites (1,747) units) for low-income housing. The following table gives a breakdown of the action taken by the City Council relative to this list:

	Sites	Units
Original CHA Submission to City Council	275	1,747
Sites Heard by Planning and Housing Committee	85	689
Remainder To Be Heard by Planning and Housing Committee	190	1,058
Original Sites Approved by City Council	50	345
Original Sites Disapproved by City Council	35	344
Alternate Sites Approved by City Council	50	387
Total Sites Approved by City Council	100	732

(Note: Attached is a map indicating the areas of the City for which hearings have been held.)†

† Editor's Note: Maps omitted for purposes of publication.

A list of the 100 sites approved by the City Council was submitted to HUD for review. The following table gives a breakdown of the action taken by HUD as outlined in their letter to the Chicago Housing Authority dated August 11, 1971:

	Sites	Units
Sites Approved by HUD	34	243
Sites Not Approved	5	35
Sites Not Considered—In Limited Public Housing Area	56*	430
Sites Not Mentioned in HUD Letter	5	24

* Of the 56 sites not considerd by HUD, 12 sites (104 units) were in Spanish Speaking communities and 5 sites (33 units) were in the Lincoln Park Community.

(Note: Attached are maps and site lists for each sector of the City reviewed by HUD)†

Of the remaining 190 original CHA sites we have completed our review of 148 sites (791 units). The following table is a breakdown of our determination of the suitability of these sites for residential development:

	Sites	Units
Suitable Sites in the General Public Housing Area	106	585
Suitable Sites in the Limited Public Housing Area	21	67
Sites for Which No Determination Has Been Made	3	30
Sites Not Suitable	18	109

(Note: Attached are maps, with the sites plotted, for the areas considered in the above table)†

We are now in the process of finalizing our review of the remaining 42 original CHA sites.

† Editor's Note: Maps omitted for purposes of publication.

APPENDIX C.

DOROTHY GAUTREAUX et al.,

Plaintiffs,

vs.

THE CHICAGO HOUSING AUTHORITY et al.,

Defendants.

No. 66 C 1459.

United States District Court
N. D. Illinois, E. D.

Feb. 10, 1969.

MEMORANDUM OPINION.

AUSTIN, *District Judge.*

Plaintiffs, Negro tenants in or applicants for public housing, sue on behalf of themselves and all others similarly situated alleging that defendants, the Chicago Housing Authority (CHA), a municipal corporation, and C. E. Humphrey, Executive Director of CHA, have violated their rights under the Fourteenth Amendment of the Constitution of the United States. Count I charges that defendants intentionally chose sites for family public housing and adopted tenant assignment procedures in violation of 42 U. S. Secs. 1981 and 1983 for the purpose of maintaining existing patterns of residential separation of races in Chicago. Count III alleges that regardless of their intentions defendants violated 42 U. S. C. Secs. 1981 and 1983 by failing to select family public housing sites in such locations as would alleviate existing patterns of residential separation. Counts II and IV repeat the allegations in Counts I and III respectively and demand relief under 42 U. S. C. Sec.

2000d (Section 601 of Title VI of the Civil Rights Act of 1964).

On March 2, 1967 this court denied defendants' motion to dismiss for failure to state a claim upon which relief can be granted as to Counts I and II and granted the motion as to Counts III and IV, 265 F. Supp. 582. Plaintiffs' remaining requests for relief include (1) a declaratory judgment pursuant to 28 U. S. C. Secs. 2201 and 2202 that defendants have selected sites in violation of plaintiffs' constitutional rights, (2) a permanent injunction against the racially discriminatory aspects of the public housing system, (3) an order directing defendants to submit and carry out a plan for selection of future sites to eliminate these discriminatory aspects, and (4) a declaratory judgment that plaintiffs have the right under 42 U. S. C. Sec. 2000d to end the use of federal funds to prepetuate the racially discriminatory aspects of the public housing system and an injunction against such use. Since March 2, 1967 the parties have amassed thousands of pages of depositions, affidavits and exhibits. Both parties now move for summary judgment on Counts I and II.

I. Discriminatory Tenant Assignment Practices.

Plaintiffs charge that defendants have imposed quotas at four White family housing projects to keep the number of Negro families to a minimal level.

The Trumbull, Lathrop, Lawndale and Bridgeport projects were built before 1944 in areas which were then and are now substantially all White. Baron Affidavit, Exhibit A. Until 1954 CHA refused to permit Negro families to reside in these projects. Statement of Elizabeth Wood, Head of CHA until August 23, 1954. The Negro population in the four projects on December 31, 1967 represented respectively about 7%, 4%, 6% and 1% of the total. Stipulation, July 29, 1968. At present Negroes comprise about 90% of the tenants in CHA family

housing projects and about 90% of the waiting list of 13,000 persons. CHA Sept. 20 Brief, p. 7, p. 18.

The disparity between the low number of Negro families in these projects and the high number of Negro applicants for all projects indicates that CHA has imposed a Negro quota. Alvin Rose, Executive Director (chief executive officer) of CHA from September 1957 to November 1967, testified on deposition that CHA devised "elastic quotas" (p. 173) at the four projects which can more accurately be characterized as "fixed" (p. 180). Harry Schneider, Deputy Executive Director of CHA, formerly Director of Management from May 1950 to January 1968, testified that until May 22, 1968 these four projects were listed on CHA tenant selection forms as appropriate for "A families only," that is, Whites only. Schneider Dep., p. 77. He states that in these projects there are "controls" on the number of Negro applicants accepted (p. 75), that Negro population in these projects is now "fairly close" to the "appropriate maximum number" (p. 78), and that if, for example, Trumbull attained the level of 35 Negro families a "hold" would maintain the occupancy at that level (p. 84.) Mrs. Louise Webb, in charge of processing tenant applications for CHA, confirms Mr. Schneider's testimony that quotes are now in force. Webb Dep., p. 61.

CHA does not contradict these statements of its own officials. The "history of tension, threats of violence and violence" urged in justification by CHA cannot excuse a governmentally established policy of racial segregation. Cooper v. Aaron, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). In fact, the only violent incident mentioned by Mr. Schneider occurred in 1953, and Mr. Rose recalled that one incident indicating White hostility to Negroes occurred at Bridgeport in 1959. Schneider Dep., p. 63; Rose Dep., p. 163. Precautions taken in the wake of these incidents such as notifying the police and Human Relations Commission are no longer taken when Negroes are moved into the White projects. Schneider Dep., p. 82. These remote incidents do not show a clear threat of

violence which might justify quotas as a very temporary expedient. In any case, CHA's quotas clearly have maintained Negro occupancy at a permanently low level. Therefore, plaintiffs are entitled to appropriate relief against the defendants' policy of denying applications to the four projects on the basis of racial quotas. Detroit Housing Commission v. Lewis, 226 F. 2d 180 (6th Cir. 1955).

II. Discriminatory Site Selection Procedures.

In choosing sites for public housing, the CHA is directed by statute to follow these criteria:

> [E]limination of unsafe and unsanitary dwellings, the clearing and redevelopment of blighted and slum areas, the assembly of improved and unimproved land for development or redevelopment purposes, the conservation and rehabilitation of existing housing, and the provision of decent, safe, and sanitary housing accommodations.
>
> Ill. Rev. Stat., Ch. 67½, § 8.2.

The City Council must approve all sites before they are acquired Ill. Rev. Stat., Ch. 67½, Sec. 9. However, CHA is not compelled to acquire or build upon all sites thus approved. Humphrey Dep., p. 107.

Plaintiffs charge that the procedure mainly used by defendants to maintain existing patterns of racial residential separation involved a pre-clearance arrangement under which CHA informally submitted sites for family housing to the City Council Alderman in whose ward the site was located. CHA admits the existence of this procedure. E.g., Humphrey Aff't., p. 7. The Alderman to whom White sites were submitted allegedly vetoed these sites because the 90% Negro waiting list occupancy rate would create a Negro population in the White area. Plaintiffs allege that the few White sites which escaped an Alderman's informal veto were rejected on racial grounds by the City Council when they were formally submitted by CHA for approval.

A. Statistics on Sites Considered and Selected.

As of July, 1968, CHA had in operation or development 54 family projects at 64 sites in Chicago consisting of 30,848 units. CHA Sept. 20 Brief, p. 7, (adopting figures in Baron Aff't. submitted by plaintiffs). Exclusive of the four segregated White projects, CHA's family housing tenants are 99% Negroes. Stipulation, July 29, 1968. Exclusive of the four projects, housing units now located in neighborhoods[1] between 50% and 100% Negro represent 99½% of the total units operated by CHA; units in neighborhoods between 75% and 100% Negro are 92% of the total; and units in areas over 95% Negro are two-thirds of the total. Baron Aff't., Ex. A. A glance at a map depicting Negro areas of residence in Chicago confirms that the 50% to 90% Negro areas are almost without exception contiguous with 90% to 100% Negro areas and that the relatively small numbers of Chicago Negroes not concentrated in the over 90% areas are almost entirely concentratd in the over 50% areas. Baron Aff't., Ex. F. Therefore, given the trend of Negro population movement, 99½% of CHA family units are located in areas which are or soon will be substantially all Negro. Baron Aff't., Ex. G. It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas came about without the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas.

To sustain their burden of proving that defendants' past and present policies have deprived them of their constitutional rights,

1. Both parties adopt as accurate representations of Chicago's current neighborhoods the census tracts derived from the 1960 Census of Population and Housing, Chicago, published by U. S. Bureau of Census. Baron Aff't.; Humphrey Aff't. Chicago consists of 935 compact census tracts with a population of relatively uniform characteristics averaging 4,000 people. The census figures classify the races as White and Non-White, but both parties use the Non-White figure to represent Negroes since 97% of Chicago's Non-Whites are Negroes.

plaintiffs contend that, during the consideration of each of the five major family housing programs since 1954, White sites meeting all appropriate criteria were rejected for racial reasons. Mr. Humphrey's affidavit sets forth (a) the total number of sites initially selected by CHA which met criteria of slum clearance, cost limitations, accessibility to public facilities, and overall metropolitan planning (b))White sites initially selected which met these same criteria (c) the number of apartment units planned for the White sites initially selected as a percentage of the total apartment units planned for all sites selected, (d) White sites finally approved by the City Council, and (e) Negro sites approved.

	(a) Sites Initially Selected	(b) White Sites Initially Selected	(c) Per Cent of Units in White Sites Initially Selected	(d) White Sites Approved	(e) Negro* Sites Approved
1955 Program	25	4	45%	0	19
1956 Program	11	4	30%	0	5
1958 Program	11	2	31%	0	7
1965 Program	18	9	50%	0	9
1966 Program	38	22	50%	2	9

* The sites classified by Mr. Humphrey as in Negro neighborhoods were primarily in over 95% Negro neighborhoods, but a few sites so classified were in neighborhoods which were ⅓ White.

Mr. Humphrey estimates that the sites selected initially by CHA for the five programs totalled 7,883 White housing units and 10,901 Negro units for a total of 18,784 units. One of the two White sites finally approved in 1966 included 400 units and was located on vacant land bounded on one side by a predom-

inantly Negro area and partially occupied by dilapidated Negro shacks. Humphrey Dep. II, p. 190. The mere fortuity that this site was included in a 72.8% White census tract does not make it relevant to negate the inference of a policy against choosing sites in White neighborhoods. The other White site approved in 1966 was planned for 36 units. CHA did not proceed formally to submit for City Council approval seven White sites in 1965 because "the Aldermen in whose Wards those sites were located advised of community opposition and indicated they were opposed to such sites in their Wards." Humphrey Aff't., p. 6. One White site in the 1965 program was not submitted to the City Council because the City Department of Development and Planning advised against its acquisition, presumably because it conflicted with other urban planning projects. The only White site formally submitted was dropped from consideration by the City Council Committee on Planning and Housing. In 1966 the Department of Development and Planning advised against all 20 of the White sites not formally submitted because it "either (a) disapproved the site, (b) recommended deferment of (c) advised of Aldermanic opposition." Humphrey Aff't., p. 9. Since the Department merely assumed CHA's admitted former role in the pre-clearance procedure, it must be inferred in the absence of a suggestion to the contrary by defendants that only a minimal number of White sites in 1966 were disapproved because they conflicted with other urban development projects.

Additional family sites not included in the five programs were developed in 1963 in a Negro neighborhood (346 units) and in 1965 in two White neighborhoods (12 units). CHA also operates 5,050 units of public housing for elderly persons of which 54½% are in substantially White neighborhoods. Fifty-seven per cent of 2,047 elderly housing units presently in development are in White neighborhoods. The Illinois statutory procedures applying to family housing projects, including the requirement of City Council approval, apply also to elderly housing projects. (Plaintiffs' Complaint is not directed to elderly hous-

ing.) But the relatively equal distribution between White and Negro elderly housing sites actually developed arises from circumstances which are not applicable to family housing sites. In selecting tenants for elderly housing Mr. Rose conceived a "proximity rule" under which the applications of persons living within a two block radius of the site of an elderly housing project were granted priority and successive priorities were given to persons living within concentric half mile circles. Rose Dep., p. 196. The "proximity rule" helped "very obviously" to obtain an Alderman's approval because it was a "fair assumption" that a White site would be occupied by Whites. Rose Dep., p. 197. CHA abandoned the "proximity rule" after the Commissioner of Public Housing Administration informed CHA that enforcement of the "proximity rule" would result in loss of federal funds. Letter of December 11, 1963, Rose Dep., Ex. 4. Before abandonment of the "proximity rule" the selection of elderly housing sites in White areas was consistent with a policy against placing Negroes in White neighborhoods, and after its abandonment a change to a policy of selecting all Negro sites would almost certainly have resulted in a loss of federal funds. Therefore, the circumstances surrounding the choice of sites for elderly housing tend to prove a purpose to perpetuate racial separation rather than to refute it. The mix of White and Negro elderly housing sites is not relevant except to show (as does the nearly identical mix between White and Negro family sites initially selected by CHA) what would probably have happened in the absence of a policy of eliminating White sites on racial grounds.

No criterion, other than race, can plausibly explain the veto of over 99½% of the housing units located on the White sites which were initially selected on the basis of CHA's expert judgment and at the same time the rejection of only 10% or so of the units on Negro sites.

B. Testimony on Site Selection Criteria

High CHA officials clearly understood the message of the statistics, and with commendable frankness some of them said so. While Executive Director, Mr. Rose testified in 1959 before the U. S. Commission on Civil Rights:

> "Q. Because of the present location of the existing sites, then, the Council of Chicago is guilty of practicing to a certain degree segregated housing, is that true?
>
> A. You are only agreeing with me.
>
> Q. Well, somebody is guilty of contributing to the segregation of housing of people in the City of Chicago, because when you look at the present location of the housing projects, they are predominately within the Negro area.
>
> A. That is true."

Rose Dep., p. 9.

On July 16, 1966, Mr. Humphrey, who was then Deputy Executive Director, responded to a question from Alderman in testimony before the City Council:

> "Q. And did he then ask you why the Housing Authority hadn't presented any sites outside the segregated Negro neighborhoods?
>
> A. I think he asked that question, yes.
>
> Q. And did you answer that the reason was you couldn't find any suitable sites outside the Negro neighborhoods?
>
> A. I didn't answer it that way at all.
>
> Q. What answer did you give?
>
> A. I answered it to the effect that he knew as well as I as to why we didn't have other sites; that he knew that if the site was approved by the alderman that it was included in the package and if it wasn't approved it wasn't included, and I added to that, incidentally, there are none in the package from your ward."

Humphrey Dep., p. 133.

Mrs. Kathryn Moore, General Counsel of CHA, stated that in her opinion land in White areas equally suitable for development and often cheaper than land in Negro areas was unavailable solely because of the requirement of City Council approval. Moore Dep., 18 and Ex. 5.

CHA follows an unvarying policy "based upon actual experience in submitting sites to the City Council for approval" of informally clearing each site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman. Humphrey Aff't., p. 7; Humphrey Dep. I, p. 100; Rose Dep., p. 59. (There is some confusion whether the White sites eliminated from the 1955, 1956 and 1958 programs were formally submitted to the City Council or informally vetoed. Cf. Humphrey Aff't., pp. 4-6, with Humphrey Dep. I. pp. 98-100.) The statements of Mr. Humphrey and Mr. Rose quoted above indicate that they personally knew that this procedure would result in the veto on racial grounds of substantial numbers of White sites. Mr. Humphrey also stated on deposition:

> "Q. Was the reason actually that you knew the City Council would probably not approve public housing sites in white neighborhoods?
>
> A. I said no doubt, there.
>
> Q. You mean that was no doubt the case?
>
> A. Well, I am assuming from what had been going on the last few years that you just couldn't go anywhere in the City of Chicago that you wanted to and acquire a site.
>
> Q. Particularly in the white neighborhoods, I take it?
>
> A. Right."

Humphrey Dep. II, p. 204.

An uncontradicted affidavit claims that Mr. Charles Swibel, Chairman of the Board of Commissioners of CHA, stated in private conversations on numerous occasions that the City

Council had CHA "over a barrel" and consequently CHA acquiesced in choosing sites in Negro neighborhoods. Berry Aff't. Since CHA directly denies none of these statements or numerous other statements to a similar effect cited in Plaintiffs' briefs, there is no genuine issue as to the truth of the fact that the pre-clearance procedure was known by CHA to result in the veto of substantial numbers of sites on racial grounds.

C. Legal Consequences of the Site Selection Policies

On March 2, 1967 this court ruled that "plaintiffs, as present and future users of the system, have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves." 265 F. Supp. 582, 583. The statistics on the family housing sites considered during the five major programs show a very high probability, a near certainty, that many sites were vetoed on the basis of the racial composition of the site's neighborhood. In the face of these figures, CHA's failure to present a substantial or even a speculative indication that racial criteria were not used entitles plaintiffs to judgment as a matter of law. Jones v. Georgia, 389 U. S. 24, 88 S. Ct. 4, 19 L. Ed. 2d 25 (1967) (finding of discrimination based entirely on jury selection statistics and absence of explanation); Hernandez v. Texas, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954) (same). The additional evidence of intent, composed mostly of uncontradicted admissions by CHA officials, also establishes plaintiffs' right to judgment as a matter of law either considered alone or in combination with the statistics. Cypress v. Newport News General and Nonsectarian Hospital Assn., 375 F. 2d 648 (4th Cir. 1967).

Defendants urge that CHA officials never entertained racist attitudes and that "the racial character of the neighborhood has never been a factor in CHA's selection of a suitable

site." Humphrey Aff't., p. 2. In view of CHA's persistent selection of White sites at the initial stage before the pre-clearance procedure and the candor of its officials on deposition, these statements are undoubtedly true. It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued. Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of the White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. Humphrey Dep. I, pp. 116-117; Rose Dep., p. 59. But even if the Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing. U. S. v. School District 151, 404 F. 2d 1125, (7th Cir. Dec. 17, 1968), at p. 11 of the slip sheet opinion; cf. Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967).

CHA finally contends that the impulse originating and sustaining the policy against choosing White sites came from the City Council. But by incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate. It is no defense that the City Council's power to approve sites may as a matter of practical politics have compelled CHA to adopt the pre-clearance pro-

cedure which was known by CHA to incorporate a racial veto. In fact, even if CHA had not participated in the elimination of White sites, its officials were bound by the Constitution not to exercise CHA's discretion to decide to build upon sites which were chosen by some other agency on the basis of race. Cooper v. Aaron, 358 U. S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958); Orleans Parish School Board v. Bush, 268 F. 2d 78 (5th Cir. 1959). See also U. S. v. School District 151, *supra*, in which the court observed at footnote 7, "There is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record." Although neither the City Council nor its members individually are parties to this suit, they will be bound by any order entered in this case against CHA of which they have actual notice. FRCP 65(d).

III. Relief.

Plaintiffs' motion for summary judgment is granted on Count I; defendants' motion is denied.

A final judgment embracing all claims for relief shall not be entered for 30 days. During that time the parties should attempt to formulate a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selection and tenant assignment procedures. If the parties cannot agree, each party shall submit a proposed judgment order.

Summary judgment is denied as to both parties on Count II. Although this court held on March 2, 1967 that Count II states a claim upon which relief can be granted under 42 U. S. C. Sec. 2000d (Section 601 of Title VI of the Civil Rights Act of 1964), judgment on Count II would, in the context of this case, determine the propriety of granting a narrow, drastic kind of relief—that of enjoining the use of federal funds. The Public Housing Administration has already taken a position against denying federal funds in reply to a rather scanty presen-

tation protesting the selection of a few sites on the basis of racial composition of their neighborhoods. Letter of October 14, 1965 from Marie C. McGuire, Commissioner of PHA, to Rev. Jerome Hall of the West Side Federation, Swibel Dep., Ex. 3. In addition to the uncertainty of whether PHA would hold it appropriate to deny funds under the facts as they are now known, it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect. The use of threatened denial of funds to coerce compliance with the Constitution, if coercion is necessary, would seem to be a less efficient remedy than an injunction available under Count I. Therefore, summary judgment is denied without precluding plaintiffs from showing on the basis of more facts that denial of federal funds is an appropriate form of relief.

Two further results of CHA's participation in a policy of maintaining existing patterns of residential separation of the races must be mentioned. First, as Dr. Baron's Affidavit discloses, the 188,000 White families eligible for public housing have understandably chosen in the main to forego their opportunity to obtain low cost housing rather than to move into all Negro projects in all Negro neighborhoods. This is an ironic but predictable result of a segregationist policy of protecting Whites from less than half as many (76,000) eligible Negro families. Second, existing patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions.

APPENDIX D.

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS, ROBERT M. FAIRFAX and JIMMIE JONES,

Plaintiffs,

vs.

THE CHICAGO HOUSING AUTHORITY, a Corporation, and C. E. HUMPHREY, Executive Director,

Defendants.

Civ. A. No. 66 C 1459.

United States District Court
N. D. Illinois, E. D.

July 1, 1969.

JUDGMENT ORDER.

AUSTIN, *District Judge.*

This matter coming on to be heard pursuant to this Court's Memorandum Opinion of February 10, 1969, D. C., 296 F. Supp. 907, and Orders entered on such date denying defendants' motions for summary judgment, denying plaintiffs' motion for summary judgment as to Count II of the Complaint, and granting plaintiffs' motion for summary judgment as to Count I of the Complaint, and

The Court having conferred with counsel for the parties and having determined that the several provisions of this judgment order are necessary to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures,

to the end that plaintiffs and the class of persons represented by them, Negro tenants of and applicants for public housing in Chicago, shall have the full equitable relief to which they are entitled.

It is hereby ordered:

I. For purposes of this judgment order.

A. "CHA" shall mean the defendant, Chicago Housing Authority.

B. "Dwelling Unit" shall mean an apartment or single family residence which is to be initially made available to and occupied by a low-income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family. "Dwelling Units" include "Leased Dwelling Units" as hereinafter defined.

C. "Leased Dwelling Unit" shall mean a Dwelling Unit in a structure leased or partially leased by CHA from any person, firm or corporation.

D. "Limited Public Housing Area" shall mean that part of the County of Cook in the State of Illinois which lies either within census tracts of the United States Bureau of the Census having 30% or more non-white population, or within a distance of one mile from any such census tract. "General Public Housing Area" shall mean the remaining part of the County of Cook in the State of Illinois. The terms "non-white" and "white" shall have the meaning given to such terms by the United States Bureau of the Census.

For purposes of this subsection D, results of the 1970 and each subsequent census taken by the United States Bureau of the Census shall presumptively determine the non-white population of census tracts until results of

a subsequent such census are officially published; provided, that any party may, on motion, offer evidence as to the non-white population of any census tract for the purpose of rebutting such presumption; and provided further, that Dwelling Units located or proposed to be located in any census tract subsequent to official publication of the results of the last previous such census shall be taken into account in determining the population of such census tract, and for such purpose it shall be assumed that such Dwelling Units will be occupied by non-whites at the rate of two persons per bedroom.

For the period from the date hereof until the official publication of such 1970 census results, the census tracts in the City of Chicago listed on Exhibit A, attached hereto, shall be presumed to have 30% or more non-white population; and, subject to evidence offered on motion by either party, the non-white population of census tracts in the County of Cook outside of the City of Chicago shall be presumed to be as stated in the 1960 census of the United States Bureau of the Census.

E. "Public Housing Project" shall mean any thirteen or more Dwelling Units which are located (1) in the same structure, (2) on the same lot or parcel of real estate, or (3) on two or more lots or parcels of real estate which are contiguous to one another, or are separated only by streets, alleys, bodies of water, railroad tracks or the like.

II. Following the date of this judgment order CHA shall not authorize, approve or implement any plan for Dwelling Units, nor shall CHA seek any approval or request or accept any assistance from any government agency with respect thereto (including without limitation approval of the acquisition of any interest in real estate), unless such plan affirmatively requires that,

A. All Dwelling Units provided for in such plan shall be located in conformity with the provisions of Article III hereof, and

B. The activities to be performed in order to render such Dwelling Units available for occupancy (whether construction, purchase, rehabilitation, leasing or otherwise) shall take place at such times as will result in the location of such Dwelling Units in conformity with the provisions of Article III hereof.

III. Following the date of this judgment order CHA shall provide Dwelling Units as follows, and not otherwise:

A. The following Dwelling Units may be made available for occupancy without restriction imposed by this order:

(1) The 1458 Dwelling Units provided for by pending CHA projects Ill. 2-27, 2-28 (exclusive of Dwelling Units proposed to be located at 70th and Harper streets in the City of Chicago), 2-32, 2-33, 2-51, 2-64, 2-69 and 2-74.

(2) Leased Dwelling Units (but not more than two per structure) which have been occupied for at least six months prior to CHA's leasing the same by tenants who continue in occupany following CHA's leasing thereof.

B. CHA shall not commence or cause to be commenced the construction of any Dwelling Units, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, until CHA shall have commenced or caused to be commenced, and shall be continuing or shall have completed, the construction of not less than 700 Dwelling Units located in the General Public Housing Area of the City of Chicago.

C. Subject to the provisions of Sub- shall not commence or cause to be commenced the construction of any

Dwelling Units in any Limited Public Housing Area, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, unless within three months following such commencement of construction at least 75% of the Dwelling Units on which CHA shall have commenced or caused to have commenced construction, and shall have continued or completed construction, since the commencement of construction of the last of 700 Dwelling Units referred to in subsection B of this Article III shall have been located (at the time of commencement of construction thereof) in the General Public Housing Area of the City of Chicago.

D. Subject to the provisions of subsection E of this Article III, no Leased Dwelling Unit shall be made available for occupancy in the Limited Public Housing Area of the City of Chicago (in addition to Leased Dwelling Units in such Area which are already occupied) unless, immediately following such occupancy, at least 75% of the Leased Dwelling Units then occupied are located in the General Public Housing Area of the City of Chicago; provided, that such number of Leased Dwelling Units located in the General Public Housing Area of the City of Chicago may be less than such 75% to the extent Dwelling Units other than Leased Dwelling Units have been occupied, or are under construction which is continuing, in the General Public Housing Area of the City of Chicago in excess of the 75% minimum requirement of subsection C of Article III hereof.

E. Not more than 33⅓% of the Dwelling Units required by subsection C of this Article III to be located in the General Public Housing Area of the City of Chicago, and not more than 33⅓ of the Leased Dwelling Units required by subsection D of this Article III to be located in the General Public Housing Area of the City of Chicago, may at the option of CHA, be planned for and located in the General Public Housing Area of the County of Cook

in the State of Illinois, outside of the City of Chicago, provided that (whether or not constructed by CHA) the same are made available for occupancy by CHA to, and are occupied by, residents of the City of Chicago who have applied for housing to CHA, and provided further that all such Dwelling Units comply with the provisions of Article IV of this order.

IV. Following the date of this judgment order CHA shall not concentrate large numbers of Dwelling Units in or near a single location. Without limiting the foregoing, unless part of a development specifically designed to assist in achieving the purposes hereof as to which the Court by order shall have given its approval.

A. No Public Housing Project shall contain Dwelling Units designed for occupancy by more than 120 persons, except that if it is impossible for CHA to provide within such limitation Dwelling Units which it is otherwise capable of providing, and if it will assist in achieving the purposes of this judgment order, a Public Housing Project may contain Dwelling Units designed for occupany by not more than 240 persons.

B. No Dwelling Units shall be located in any census tract if, following such location, the aggregate number of apartments and single family residences theretofore made available to low-income, non-elderly families, directly or indirectly by or through CHA, in such census tract would constitute more than 15% of the total number of apartments and single family residences in such census tract; and

C. No Dwelling Units shall be provided above the third story in any structure except for families without children and except Leased Dwelling Units in a structure in which the number of Dwelling Units aggregates no more than 20% of the total number of apartments in such structure.

V. Within 30 days following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs evidence that CHA has modified its tenant assignment policy, adopted by CHA Board Resolution No. 68-CHA-232, a copy of which is attached hereto as Exhibit B, and its practices thereunder, to include all Leased Dwelling Units as a single "location" for the purposes thereof. Such policy and practices, as so modified, shall be applicable until the further order of this Court.

VI. Within 60 days following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs a tenant assignment plan. Such plan shall include, but need not be limited to, provisions having the following purpose and effect:

A. Such modifications, if any, shall be made in CHA's tenant assignment policy and practices as will assist in achieving the purposes of this judgment order.

B. New registrations on CHA's list of persons desiring housing (the "waiting list") shall be temporarily ended; a determination shall be made promptly as to which registrants remain eligible for and still desire public housing; intensive publicity shall then be employed in such manner as effectively to inform low-income families throughout the City of Chicago, including present CHA tenants, that substantial numbers of Dwelling Units will be made available in the General Public Housing Area of the City of Chicago pursuant to the provisions of this judgment order; and thereafter the "waiting list" shall be reopened to new registrants, including present CHA tenants who wish to apply for Dwelling Units in the General Public Housing Area.

C. Not more than 50% of the Dwelling Units in all Public Housing Projects shall be made available to eligible neighborhood residents, the remaining Dwelling Units to

be made available for occupancy in accordance with subsection A of this Article VI.

D. Vacancies in CHA's Trumbull, Lathrop, Lawndale, and Bridgeport projects shall be filed in accordance with subsection A of this Article VI, except that such tenant assignment plan may contain provisions designed to assure that such projects do not become racially segregated.

E. Suitably detailed information shall be regularly filed with the Court and served upon counsel for the plaintiffs showing CHA's compliance with the provisions of this Article VI and such tenant assignment plan.

Following the filing and service of such tenant assignment plan the Court will enter such further order as it deems appropriate.

VII. Following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs, the Civil Rights Division of the United States Department of Justice, and the Regional Administrator of the Department of Housing and Urban Development, the following:

A. A statement of the following information respecting each location for one or more Dwelling Units, such statement to be filed and served not more than 10 days after any such location is approved by the Board of Commissioners of CHA (or by the appropriate CHA officer or employee with respect to any location not required to be approved by the Board of Commissioners) and prior to the formal submission thereof to any other government agency or official for consideration or action:

(1) a map showing boundaries, placement in relation to adjacent streets and, where available street address;

(2) the area location (whether within the Limited or General Public Housing Area);

(3) the census tract number;

(4) the white and non-white population of such census tract;

(5) the aggregate number of apartments and single family residences theretofore made available to low income, non-elderly families, directly or indirectly by or through CHA in such census tract;

(6) the aggregate number of apartments and single family residences in such census tract as reflected by the most recent census taken by the United States Bureau of the Census, supplemented by such information with respect thereto as is available to CHA from any other government agency or official (but the statement need not include such number if the number supplied with respect to the preceding paragraph 5 is zero);

(7) the total number of Dwelling Units proposed to be provided at such location;

(8) the number of structures, and the number of Dwelling Units in each, in which such Dwelling Units are proposed to be provided; and

(9) such additional data as will show that such proposed Dwelling Units will be made available for occupancy in conformity with the provisions of Articles III and IV hereof, including without limitation, in the event such proposed Dwelling Units would result in a Public Housing Project designed for occupancy by more than 120 persons, information showing that the provisions of subsection A of Article IV hereof have been met with respect to such Public Housing Project.

B. Statements setting forth any change in the information included under paragraphs (1), (2), (3), (5), (7), (8) or (9) in a statement filed and served pursuant to subsection A of this Article VII, and covering the period up to initial occupancy of all Dwelling Units at any location,

such statements to be filed and served not more than 10 days after any such change occurs.

C. Statements covering the periods from the date hereof until December 31, 1969, and from the date hereof until the end of each calendar semi-annual period thereafter, containing such data as will show that (1) all plans for Dwelling Units during the period covered by such statements have been in conformity with the provisions of Article II hereof, and (2) all Dwelling Units provided during the period covered by such statements have been in conformity with the provisions of Article III and IV hereof, such statements to be filed and served not more than twenty days after the end of each calendar semi-annual period beginning with such period ended December 31, 1969.

VIII. CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,

A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development; and

B. CHA is hereby permanently enjoined from invidious discrimination on the basis of race in the conduct or operation of its public housing system, including without limitation the "pre-clearance procedure" described in the Court's Memorandum Opinion of February 10, 1969.

IX. This order shall be binding upon CHA, its officers, agents, servants, employees, attorneys, and their successors, and upon those persons, including the members of the City Council

of the City of Chicago, in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

X. This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order or any other matter.

XI. The costs of this action shall be taxed against CHA, subject to the further order of this Court.

EXHIBIT A.

Census Tract Numbers

114 through 116
120 through 137
280 through 282
340 through 347
348-Z
349-Z
350 through 352
353-Z
354 through 355
357 through 362
363-Z
364 through 373
375-Z through 378-Z
379 through 383
384-Z
389-Z
390-Z
391 through 392
395
399-Z
401-Z
403
410-Z
412 through 420
428 through 429
431-Z
432
434-Z
440 through 441
442-Z
444 through 449
450-A
450-B
451 through 457
460 through 467
468
469-Z
470
487
519-Z
520 through 521
524
527-Z
532-Z
534-Z
539-Z
541 through 553
554-Z
556 through 562
564-Z
567-Z
569-Z
574 through 610
613-Z
614 through 619
620-Z
621-Z
623 through 641
642-A
642-B
643 through 650
652
653-Z
655
656-Z
657
658-Z
659 through 662
664
666 through 667
675 through 678
681-Z through 683-Z
685 through 686
687-Z
688
690 through 691
695
697
711
717-Z
719-Z
720-Z
723
803 through 805
852
855
858 through 859
861 through 862
867-Z
868 through 895
897-Z
898 through 900
903
905 through 911
912-A through 912-D
922
923-A
923-B
924 through 927
932
934 through 935

EXHIBIT B.

Tenant Selection and Assignment Plan

Each applicant shall be assigned his appropriate place on a community wide basis in sequence based upon date and time his application is received, suitable type or size of unit, and factors affecting preference or priority established by the Local Authority's regulations. At a given time, the applicant first on the waiting list shall be offered a dwelling unit in accordance with the following plan:

1. If at the time the applicant comes to the top of the waiting list there are suitable vacancies in three or more locations, the applicant shall be offered the unit at the location that contains the largest number of vacancies. If the applicant rejects the first vacancy offered he shall be offered a suitable unit at the location containing the next highest number of vacancies. If the applicant rejects the second vacancy offered he shall be offered a suitable unit at the location containing the next highest number of vacancies. If the applicant rejects the third vacancy offered he shall be moved to last place on the eligible applicant list. When an offer of a suitable vacancy is made to an applicant, there must be a rejection of such offer before the applicant will be offered another location. Thus, the offering of a unit at the location with the second largest number of suitable vacancies will not be made until the applicant has first rejected the unit offered at the location with the largest number of vacancies. The offering of a unit at the location with the third largest number of suitable vacancies will not be made until the applicant has rejected the unit offered at the location with the second largest number of suitable vacancies.

2. If at the time the applicant comes to the top of the waiting list there are suitable vacancies in only two locations, the applicant shall be offered the unit at the location that contains the largest number of vacancies. If the applicant rejects the first vacancy offered he shall be offered a suitable unit at the second location. If the applicant rejects the second vacancy offered he shall be moved to last place on the eligible applicant list. When offers of suitable vacancies are made to applicants, there must be a rejection of the first offer before the applicant will be offered the second suitable vacancy.
3. If at the time the applicant comes to the top of the waiting list there is only one location at which a suitable vacancy exists, the applicant will be offered a unit at that location. If the applicant rejects the unit offered, he shall remain at the top of the waiting list until a second offer of a suitable vacancy can be made. Should the applicant reject the second offer of a suitable vacancy he shall be moved to last place on the eligible applicant list.

In carrying out the above plan, should the applicant be willing to accept the unit offered but be unable to move at the time of the offer and presents clear evidence of his inability to move to the Local Authority's satisfaction, refusal of the offer shall not count as one of the number of allowable refusals permitted the applicant before placing his name at the bottom of the eligible applicant list.

In carrying out the above plan, should the applicant present to the satisfaction of the Local Authority clear evidence that acceptance of a given offer of a suitable vacancy will result in undue hardship or handicap not related to considerations of race, color, or national origin, such as inaccessibility to source of employment, children's day care and the like, refusal of such an offer shall not be counted as one of the number of allowable refusals permitted an applicant before placing his name at the bottom of the eligible list.

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Nos. 73-784 and 73-785

In the
Supreme Court of the United States
October Term, 1973

CITY OF CHICAGO, RICHARD J. DALEY, and FRED B. ROTI, et al., Members of the City Council of the City of Chicago, et al.,

Petitioners,

vs.

DOROTHY GAUTREAUX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

Nos. 73-784 and 73-785

CITY OF CHICAGO, RICHARD J. DALEY, and FRED B. ROTI, et al., Members of the City Council of the City of Chicago, et al.,

Petitioners,

vs.

DOROTHY GAUTREAUX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

The "Questions Presented" and "Statement of the Case" are misleadingly presented in the petition for a writ of certiorari. We therefore begin with those two sections and then respond ("Argument") to the three reasons advanced for granting the writ.

QUESTION PRESENTED

Whether, after long and frustrating non-compliance with a remedial public housing desegregation order,* a district court may enter a declaratory judgment that (until further order of the court) a state law giving a city council veto power over a local housing authority's proposed public housing sites should be inapplicable to the authority's proposed sites, where the evidence shows,

(1) The council had refused to act on proposed sites notwithstanding many were suitable for public housing purposes and were selected by the authority to enable it to comply with the court's desegregation order,

(2) No explanation for the council's refusal to act was given except that, as stated by one alderman, a majority of the council could not be obtained to "put that many housing units in white neighborhoods," and

(3) The council's refusal to act was preventing the housing authority from implementing the district court's desegregation order.

STATEMENT OF THE CASE

Relevant background appears in decisions reported at 296 F.Supp. 907; 304 F.Supp. 736; 436 F.2d 306; 448 F.2d 731; 332 F.Supp. 366 and 457 F. 2d 124.** The order of the district court which is the subject of the petition is reported at 342 F.Supp. 827; the affirmance by the Court of Appeals is at 480 F.2d 210.

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*"Since, [1969, the district court's] orders have been ignored and his efforts frustrated." *Gautreaux* v. *Romney*, 457 F.2d 124, 140 (7th Cir. 1972) (dissenting opinion).

** An extensive summary of the case is given in the dissenting opinion, 457 F.2d at 129-32.

A. Submission of Sites to the City Council

1. In 1969 the district court determined that the defendant Chicago Housing Authority ("CHA") was intentionally discriminating on racial grounds in the selection of public housing sites. 296 F.Supp. 907 (Appendix C to the petition.) Its opinion directed the parties to formulate a comprehensive plan to "remedy the past effects of CHA's unconstitutional site selection . . ." 296 F.Supp. at 914; A41.*

2. Later in 1969 the district court entered a judgment order, 304 F.Supp. 736 (Appendix D to the petition), which among other things ordered CHA to,

> "use its best efforts to increase the supply of Dwelling Units as rapidly as possible . . ." 304 F.Supp. at 741; A52.

The first 700 new units were to be located in predominantly white neighborhoods (the "General Public Housing Area"); no more than one-fourth of additional dwelling units could be located in predominantly black neigh-

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* Contrary to petitioners' statement (p. 4) that the district court eliminated from consideration a separate CHA program for housing the elderly, the court considered much evidence concerning the elderly program and concluded:

> "Therefore, the circumstances surrounding the choice of sites for elderly housing tend to prove a purpose to perpetuate racial separation rather than to refute it." 296 F.Supp. at 912; A36.

Contrary also to petitioners' implication that the racial discrimination finding was based "without more" on statistics (p. 4), and to then disingenuous reference to "naked statistical argument" (p. 17), the district court considered much testimonial evidence which established plaintiffs' right to judgment "either considered alone or in combination with the statistics." 296 F.Supp. at 913; A39.

borhoods ("Limited Public Housing Area"). 304 F.Supp. at 738; A46-47.*

3. A year passed during which CHA submitted no sites for more dwelling units to the Chicago City Council, as required by Illinois law.** Pursuant to the "best efforts" provision of the 1969 order, the district court thereupon ordered CHA to submit sites for 1500 dwelling units to the city council.*** The order was affirmed on appeal. 436 F.2d 306, cert. denied, 402 U.S. 922.

4. CHA then complied and in March 1971 submitted 275 proposed sites to the city council, 235 of which (intended to accommodate approximately 1450 dwelling units) were located in the General Public Housing Area. Pl. Ex. No. 1, ¶1.****

B. Refusal of the Council to Act

1. The 275 sites were referred to a council committee, Pl. Ex. No. 1, ¶2, CHA having requested the referral and an early committee meeting because of "the urgency of this matter . . ." Pl. Ex. No. 2. The request from CHA's Executive Director went on:

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*The 700 unit provision "matches" (though reduced by 50%) the provision of the order that allowed CHA to proceed with 1458 units already planned for the Limited Public Housing Area. See 304 F.Supp. at 738; A46.

**Ill. Rev. Stat. ch. 67½, §9. The law applies only to Chicago.

***1500 dwelling units was the amount of CHA's then current "reservation" from the defendant Department of Housing and Urban Development ("HUD") which was also held liable for the discriminatory site selection in Chicago. See 448 F.2d 731.

****The 40 sites in the Limited Public Housing Area would accommodate approximately 300 units. Pl. Ex. 2. Virtually all (38) of these sites received prompt city council approval. Pl. Ex. 8.

> "The urgency I refer to is, of course, the dire need for additional housing for Chicago's families of low income. And affirmative, prompt action by the City Council in connection with these sites is a prerequisite to construction by CHA for additional housing to meet that need.
>
> Moreover, Judge Richard B. Austin has ruled that the placement of family public housing in past years was discriminatory and ordered that such pattern be reversed. The authority's current site program will implement that order." *Ibid.*

2. During June 1971 the committee held hearings on 43 of the 235 sites in the General Public Housing Area, approved 12 and disapproved 31. Pl. Ex. No. 1, ¶3. It also approved 32 additional sites in the General Public Housing Area proposed by persons other than CHA. Tr. 190-93. Later the same month the 44 sites were approved by the city council. Pl. Ex. No. 1, ¶6.

3. Following June 1971 the committee neither held hearings nor otherwise considered any of the remaining 192 sites CHA had submitted (Pl. Ex. No. 1, ¶5; Tr. 425), and the city council itself neither approved nor considered any of the remaining sites.

4. A supplemental complaint was then filed in February 1972, which added the city and the aldermen as parties defendant and sought a declaratory judgment that the effect of the operation of the state law giving the council its veto power over CHA sites was to deny plaintiffs relief to which they were entitled under the 1969 judgment order and to prevent the district court from vindicating plaintiffs' constitutional rights.* After answers were filed

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*The supplemental complaint is reproduced as Appendix A to this brief.

a hearing on the supplemental complaint and answers was held in April 1972.

5. At the hearing no evidence was offered to explain why neither the city council nor its committee had considered the remaining CHA sites. The only alderman called as witness by the city said that he had not discussed with his fellow aldermen why no hearings had been held. Tr. 302. Another alderman said that he could give no opinion as to why the committee had taken no action on CHA sites since June 1971 (Tr. 342), but added:

> "I don't think you could get, right now, an affirmative 26 votes [a majority of the council] to put that many housing units in white neighborhoods." (Tr. 343.)

A third alderman regretted that the committee hearings did not continue (Tr. 518), and said that the council did a "great disservice" by not continuing with them. Tr. 521. In a memorandum filed with the district court HUD called the "refusal" to hold further hearings "a deliberate affront to this [the district] court," and "totally contrary" to representations made by the city in a document signed by the city, CHA and HUD.*

6. An official of the city's Department of Development and Planning ("DDP") testified that he and his staff had examined most of the remaining CHA sites. Tr. 69-199. Contrary to petitioners' statement that these sites "were shown to be in violation of the city's zoning ordinance, or otherwise burdensome upon public services" (p. 6), the evidence showed that the DDP staff found over 100 of them to be "suitable sites in the General Public Housing Area." Pl. Ex. No. 8. (The relevant portion of Exhibit

*Excerpts from the HUD memorandum are reproduced as Appendix B to this brief.

No. 8 is a part of the order appealed from. 342 F.Supp. 831-32; A27-28.)* However, neither this nor any other information concerning the remaining CHA proposed sites was submitted by the DDP to the Plan Commission, the agency to which the DDP normally made its recommendations. Tr. 266. No explanation was given as to why that had not been done. Tr. 197-99.

7. The order entered at the conclusion of the hearing and affirmed on appeal finds among other things: that acquisition of sites by CHA is necessary to enable CHA to comply with the 1969 judgment order to supply more dwelling units (342 F.Supp. at 828; A21); that under state law (Ill.Rev.Stat. ch. 67½, §9) CHA may not acquire sites without city council approval (342 F.Supp. at 829; A21); that there was no showing of any necessity or reason for failure of the city council to take any action after June 1971 on CHA's proposed sites, particularly in light of the evidence that many of the sites were suitable for the provision of dwelling units (342 F.Supp. at 829; A22); and that such failure had had the effect of preventing CHA from complying with the 1969 judgment order and of preventing the Court from providing relief to which the plaintiffs were entitled. 342 F.Supp. at 829; A22. The order declares that until further order the statute requiring city council approval of CHA sites shall not be applicable to CHA's actions taken for the purpose of providing dwelling units (342 F.Supp. at 830; A23-24). and directs CHA to proceed with steps to provide the

* Of the remaining approximately 190 CHA sites, 148 had been reviewed by the DDP staff at the time of trial. No explanation was given as to why the other 42 had not been reviewed. Only 18 of the 148 reviewed sites were found by the DDP staff to be unsuitable for public housing. 342 F.Supp. at 832; A. 28.

1500 dwelling units that were the subject of the district court's earlier orders. 342 F.Supp. at 830-31; A24-26.

C. The Posture of the Parties

Appeals were taken by the city, the mayor, CHA and 39 of the 48 aldermanic defendants; they are the defendants who are now the petitioners. Five of the aldermanic defendants did not appeal, admitted all allegations of the supplemental complaint and took the position in the district court that they "fully support the efforts being made by the plaintiffs." Tr. 38. Four others likewise did not appeal. In addition, one of the petitioner-aldermen testified,

> "I would say that the Court enter an order that whether we have City Council approval or not, that we proceed . . . The prayer to by-pass the City Council is one for the Court's suggestion, and I do not quarrel with it . . ." Tr. 330-31.

HUD neither appealed nor petitioned this Court. In its answer to the supplemental complaint HUD said:

> "[HUD] suggests that the inclusion of the City of Chicago, Richard J. Daley, Mayor of the City of Chicago, and individual members of the City Council, as defendants herein, is appropriate to achieve just and equitable relief and urges this Court to enter such order or orders against the aforesaid defendants as this court deems just and equitable." Answer, Record Doc. No. 5, p. 3.

ARGUMENT

The petition argues, (1) that the Court of Appeals decision interprets the equal protection clause in a novel way that adversely effects national housing policy, (2) that the judgments below conflicts with *James* v. *Valtierra*, and (3) that it was procedurally improper to join the city, the mayor and the aldermen as parties-defendant and to grant the declaratory relief prayed for.* These arguments will be addressed in the order stated.

I. THE COURT OF APPEALS DECISION INVOLVES NO NOVEL INTERPRETATION OF THE EQUAL PROTECTION CLAUSE OR ADVERSE IMPACT ON NATIONAL HOUSING POLICY.

The petition says that the Court of Appeals has found in the equal protection clause a "new affirmative duty" of a municipality "to alleviate 'racial imbalance' in public housing sites." (p. 9.) In fact the judgments below represent nothing more than an application of the familiar principle that,

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*With the exception noted in the next sentence of this note, the only relief the district court's order grants "against" any party other than CHA is the declaratory relief contained in paragraph 2 of the ordering portion that frees CHA (until further order of the court) from the requirement of Ill.Rev.Stat. ch. 67-1/2, §9, that the city council approve its proposed sites. 342 F.Supp. at 830; 23-24. The city was ordered only to provide CHA with certain information (paragraphs 3A and 4A of the order), which it has already done; no point is made in the petition about that direction to the city. Mayor Daley was named a party defendant because under Illinois statutes he presides at city council meetings and has the power to vote under certain circumstances.

> "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971).

Petitioners' misleading characterization of the Court of Appeals opinions is made possible only by the omission of any reference to the key finding below (Findings G and H; 342 F.Supp. at 829; A 22) that by its unjustified and, indeed, unexplained refusal to take action on CHA sites, the city council was hindering the district court from providing constitutionally required relief.*

Instances of the application of the "hindering" principle to state statutes are not rare. In *Louisiana* v. *United States*, 380 U.S. 145 (1965), this Court, while declining to pass on the validity of a statutorily authorized voter-qualification test, 380 U.S. at 154 n.17, affirmed a district

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*Although the petition refers frequently to "benign considerations" assumed to lie behind the city council's inaction, on the record below this is the purest speculation. The city and the aldermen in fact declined to offer any evidence at all to explain that inaction, even though the burden was upon them to show the "supervening necessity" for it. *Crow* v. *Brown*, 332 F.Supp. 382, 392 (N.D.Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972).

That the district court's orders were frustrated by inaction rather than by affirmative conduct of the city council is of course of no moment. It is well established that inaction can frustrate as effectively as more positive conduct the implementation of remedial decrees, and the courts have routinely dealt with frustration that takes that form. See *Crow* v. *Brown, supra*, 332 F.Supp. at 391, 392; *Sisters of Providence* v. *City of Evanston*, 335 F.Supp. 396, 404-405 (N.D. Ill. 1972); *Banks* v. *Perk*, 341 F.Supp. 1175, 1180 (N.D. Ohio 1972); *Davis* v. *School District of City of Pontiac*, 309 F.Supp. 734, 741-42 (E.D. Mich. 1970), aff'd 443 F.2d 573 (6th Cir.), cert. denied, 404 U.S. 913 (1971); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F.Supp. 1245, 1252-53 (N.D. Ohio 1973).

court order enjoining use of the test in 21 Louisiana parishes until past voter discrimination had been remedied. 380 U.S. at 154-55.

In *Haney* v. *County Board of Education of Sevier County,* 429 F.2d 364 (8th Cir. 1970), the remedy for school segregation required annexation of a school district and establishment of a new school board, both of which steps appeared to be blocked by a state law. The court said:

> "[R]egardless of the constitutionality of The Arkansas Quality Education Act, it in no way limits the equity power of a federal district court in fashioning a decree which will effectuate 'a completely non-racial school system in Sevier County.'" 429 F.2d at 368-69.

In *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969), steps to desegregate a school faculty were not taken because of a mistaken view that state laws blocked the way. The court said:

> "[A] state law is invalid to the extent that it frustrates the implementation of a constitutional mandate." 406 F.2d at 1094.

Other cases cited by the district court similarly hold that local officials may be directed to ignore state law, or that actions taken or proposed to be taken under otherwise valid state laws may be enjoined, where such injunctions are necessary to remedy the effects of past discrimination. *United States* v. *State of Texas,* 321 F. Supp. 1043 (E.D. Texas 1970); *Burleson* v. *County Bd. of Election Commissioners,* 308 F.Supp. 352 (E.D. Ark. 1970). See also, *Taylor* v. *Coahoma County School Dis-*

trict, 330 F.Supp. 174 at 176, 183 (N.D. Miss., affd, 444 F.2d 221 (5th Cir. 1971)).*

The petition's argument about a novel interpretation of the equal protection clause thus ignores the existence in this case of state-imposed segregation and of the principle that to remedy such segregation federal courts may, if necessary, set aside state laws that are found to be hindering or obstructing their remedial efforts. When that fact and that principle are recognized, the judgment and opinions below are seen to fit comfortably within familiar equal protection doctrine. The City and its officials have had no affirmative duty to alleviate racial imbalance imposed upon them; they have simply been stopped from interfering with the district court's effort to provide constitutionally required relief in a situation in which they have offered no justification for their interference.**

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*Although some of the cases speak loosely of the invalidity of the state law the correct view is that, "The question of the law's validity never arises . . .; its disregard is directed as a matter of remedy alone, in order to undo the effects of proved unconstitutionally discriminatory acts." *Bradley* v. *School Board of Richmond, Virginia*, 324 F.Supp. 396, 400 (E.D. Va. 1971). And see *Louisiana, supra*. In any event, and regardless of the verbal formulation, a single judge may enter the appropriate "disregard" order; a three-judge court is not required. *Bradley, supra*, 324 F.Supp. at 400-401. See also, *Southern Alameda Spanish Speaking Organization* v. *City of Union City, Cal.*, 424 F.2d 291, 296, (9th Cir. 1970), and *Bradley* v. *Milliken*, 433 F.2d 897, 900 n.2 (6th Cir. 1970).

** It is equally plain that the "hindering" principle comes into operation when hindering is shown; there is no requirement that the state agency or official whose actions are shown to be hindering the vindication of federal constitutional guarantees also have committed an "independent" constitutional violation. State policy must give way when it operates to hinder vindication of federal

(footnote continued on page 13)

The petition also argues that the judgments below produce an adverse impact on national housing policy by making it more difficult to build public housing in inner city areas, and that "vast areas of the inner city must remain vacant" because of them. (p. 10). In fact, the April 1972 district court order that is the subject of the petition *removes* the obstacle (city council veto power) that has prevented public housing from being provided in all areas of the city, including the inner areas to which the petition refers.* Were the city as concerned about housing in the inner city at it professes, it would be supporting, not opposing, that order as a means of providing some of that housing expeditiously.**

(footnote continued from page 12)
constitutional guarantees whether or not, apart from the hindering effect, it would itself violate such guarantees. See, *e.g., Louisiana* v. *United States, supra,* 380 U.S. 145, 154-55; *North Carolina Board of Education* v. *Swann, supra,* 402 U.S. 43, 45; *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 460 (1972); and *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 489-90 (1972). See also the discussion in Part III, *infra.*

* The petition's argument is really directed to the underlying judgment order of July, 1969, not to the April, 1972, order that is the subject of the petition. But the 1969 order does *not* prohibit building in inner city areas. Under CHA's current 1500 unit reservation from HUD, 200 units of public housing may be provided in the Limited Public Housing Area. In addition, CHA has applied to HUD for another reservation of 3500 units, 875 of which may be located in the Limited Public Housing Area. Compare *Banks* v. *Perk, supra,* where the housing authority was enjoined from *any* more construction in black areas of Cleveland. 341 F. Supp. at 1185.

** No contention can be or has been made that the District Court's orders *cannot* be complied with. Although a city witness testified that approximately 75-80% of the vacant and residentially zoned land in the city is within the Limited Public Housing Area (Tr. 217), the same

(footnote continued on page 14)

Moreover, it is a false implication that if the 1969 judgment order were suddenly vacated the city and CHA could populate the inner city with new public housing projects without simultaneously providing public housing in white neighborhoods. No longer is it the 1969 order alone that stands in the way of a continuation of that past segregationist practice. A now-developed national policy, based in part on 1968 legislation which postdates the several statutes to which the petition refers, requires dispersal of public housing and would, independently of the 1969 order, preclude the build-in-the-inner-city-only course the city seems desirous of pursuing. The development of that national policy is traced in *Shannon* v. *HUD*, 436 F.2d 809, 816 (3rd Cir. 1970), and as respects public housing is succinctly summarized in *Crow* v. *Brown, supra*:

> "[B]oth by legislative act, and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. [citations omitted] . . . [I]n the area of public housing local authorities can no more confine low income blacks to a compacted and segregated area than they can confine their children to segregated schools." *Crow* v. *Brown, supra*, 332 F.Supp. at 390.*

(footnote continued from page 13)
witness said that (even without regard to the city's major land development policy of rezoning land for housing—Pl. Ex. No. 9, p. 6) there were 1,914 parcels of vacant, residentially zoned land in the General Public Housing Area of the city, ranging in size from one lot to one block. Tr. 276.

* "If plaintiffs . . . had proved . . . that the AHA [Atlanta Housing Authority] . . . is still engaged in furthering racial concentration in Atlanta by promoting low-rent public housing in compacted areas and failing to promote low-rent public housing in dispersed areas . . ., plaintiffs would have had grounds for relief against AHA under the Equal Protection Clause." *Crow* v. *Brown, supra*, 332 F.Supp. at 394.

Affirming, the court of appeals, considered a past housing authority practice of locating 75% of public housing units in Atlanta's black neighborhoods and said:

> "This policy causes and perpetuates residential racial segregation." *Crow* v. *Brown, supra,* 457 F.2d at 790.

To the same effect is *Banks* v. *Perk, supra,* 341 F.Supp. at 1179-80, where the housing authority was "enjoined from planning *any* future public housing in Negro neighborhoods of the City of Cleveland." *Id.* at 1185 (emphasis added).

HUD has now promulgated so-called project selection criteria which reflect the national policy of dispersed public housing and would themselves preclude building public housing exclusively in racially impacted inner city areas.* At the hearing below the HUD criteria were called to the court's attention by the Assistant United States Attorney representing HUD:

> "It has been given the impression during the entire hearing that if your Honor does modify or alter his judgment order either to eliminate the ratio, three to one ratio, or the elimination of 700 units, that that will allow the City or CHA to submit proposals for approval and funding by HUD. The only comment we would have to make as far as that, your Honor, is to refer your Honor's attention to the comments accompanying the new Project Site Selection criteria, and I am quoting:

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* 37 Fed. Reg. 203 (January 7, 1972). Referring to these criteria the court in *Crow* v. *Brown* said:

> "[T]he policy of HUD requires that public housing be dispersed outside racially compacted areas . . . [T]he written instructions of . . . HUD . . . direct the building of public housing outside 'ghetto' areas." *Crow* v. *Brown, supra,* 332 F.Supp. at 391.

> 'A phrase has been added which permits building in areas of minority concentration *if there exists sufficient comparable opportunities for housing for minority families in the income range to be served by the proposed project outside of areas of minority concentration.* This is designed to assure that the building in minority areas goes forward *only after there truly exists housing opportunities for minorities elsewhere.* The phrase 'sufficient comparable opportunities' is designed to assure the housing available to minorities outside areas of minority concentration is *more than a token amount of so few units that there is in fact no true opportunity.* At the same time, this phrase is not tied to any rigid formula.'
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> "So, your Honor, the position of HUD is that its regulations would apply, even assuming your Honor abolished his order, those regulations would apply to any proposal by CHA or the City of Chicago for low or moderate income housing, and that's an impression we did not want to leave the Court with, that in effect if your Honor had just vacated the entire July 1969, order that that would in and of itself mean that the City could obtain the requisite housing that they think that they need. It has to comply with our regulations." (Tr. 496-98, emphasis added.)

CHA itself has called the requirement of the 1969 order that public housing be built throughout the city "a positive policy":

> "The judge ordered CHA to build 700 homes or apartments in white areas before any more could be built in black neighborhoods, and thereafter to build 3 units in white neighborhoods for every one built in non-white areas. Actually, *this is a positive policy* since there is a serious need for low income

housing in many areas of the City—for whites as well as blacks."*

The reasons for the "positive policy" embodied in the 1969 order are well known. CHA explains them this way:

> "So long as low-income families are put into the same areas, whether in high-rise or low-rise buildings, they will lack the networth of strong economic, social and educational institutions to take care of the problems of metropolitan living. Into these communities are packed a whole range of difficult conditions. Each problem of the community feeds upon the other, magnifying them all and frustrating programs designed to meet one part of the difficulty. The result is even larger welfare costs without any hope of permanent improvement." (CHA 1971 Annual Report, p. 5.)

It is thus clear that the decision of the Court of Appeals does not adversely affect national housing policy; the judgments below are fully consistent with it. Indeed, the administrator of that policy, HUD, not only declined to appeal the district court's order but, having called the city council's refusal to act an "affront," virtually counselled its entry.

II. THE JUDGMENTS BELOW DO NOT CONFLICT WITH JAMES V. VALTIERRA.

Part II of the petition (p. 15.) asserts that this case is "identical in all essential ways" with *James* v. *Valtierra*, 402 U.S. 137 (1971).

James and this case are fundamentally different, not identical: *James* involved establishing liability whereas

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* CHA's 1971 Annual Report, p. 10 (emphasis added). The report was filed with the district court on June 30, 1972, and portions are included as Appendix C to appellees' brief in the Court of Appeals.

this case involves providing relief for liability already established. In *James* the plaintiffs were seeking to *prove* racial discrimination (relying heavily and ultimately without success on the allegedly facially discriminatory nature of the California constitution's referendum provision); here, by the opinion and judgment order of 1969, racial discrimination has already been established and the issue is how to provide effective relief. (The Court of Appeals has twice in this case made a like observation about *James*. *See Gautreaux* v. *Romney*, 448 F.2d 731, 732 n. 2, and *Gautreaux* v. *Romney*, 480 F.2d 210, 215; A.11.)*

Of course, when liability has been finally established (as here but not in *James*) the court becomes obligated to provide constitutionally required relief. State policy that hinders that task must give way, as pointed out in Part I above. That principle was not called into play in *James* because the determination there was that federal constitutional guarantees had not been violated. But there is no doubt that once, as here, such a violation *has* been established, the "hindering" principle operates as well with respect to referendums as it does with respect to state policy that takes other forms. Thus, in *United States* v.

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* Even the Justices who dissented in *James* did not do so (as the petition itself observes, p. 14) on the ground of racial discrimination, Similarly, neither of the other referendum cases cited in the petition is a case in which racial discrimination had already been established and the issue was the nature of the relief to be provided. Indeed, one of the cases cited, while denying preliminary injunctive relief, said that if apart from motive the result of a referendum were shown to be discriminatory, "in our view a substantial constitutional question is presented." *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291, 295 (9th Cir. 1970).

Scotland Neck City Board of Education, supra, 407 U.S. 484, a referendum was invalidated because otherwise it "would have the effect of impeding the disestablishment of the dual school system that existed in Halifax County." 407 U.S. at 490.

There is no conflict between the judgments below and *James.**

III. JOINING ADDITIONAL DEFENDANTS AND GRANTING DECLARATORY RELIEF WAS PROPER.

The argument in Part III of the petition rests on an erroneous implication that the city and the aldermen

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* There are other important distinctions between *James* and this case: the referendum involved in *James* is a "fundamental suffrage right" significantly different in historical context and application and presenting "quite a different constitutional ingredient" than "a *refusal* [of a city council] to take affirmative action." *Sisters of Providence* v. *City of Evanston, supra,* 335 F.Supp. 396, 403 (N.D. Ill. 1972, emphasis is the court's). In *Sisters of Providence* the court, upholding a claim that a city council's refusal to rezone property for the construction of low and moderate income housing constituted an equal protection violation, concluded that for these reasons, "the cases involving referendums . . . are a category unto themselves." *Ibid.*

The petition appears to argue that *James* and this case are alike because the evidence offered in each case to prove racial discrimination was similar: "Here, as in the referendum cases, intention to discriminate is predicated upon an assessment of public opinion." (p. 15.) The statement is incorrect. In this case proof of "a deliberate policy to separate the races" (296 F.Supp. at 914; A40) was based on testimonial evidence of practices and procedures that constituted sufficient proof of racial discrimination "either considered alone or in combination with the statistics." 296 F. Supp. at 913; A39. Proof of discrimination in this case was not rested, as the petition asserts, "upon an assessment of public opinion."

were improperly held "bound" by the 1969 judgment order to which they were not parties. The April 1972 order is based on the failure of the new defendants to act on CHA's sites subsequent to June, 1971, not on their pre-1969 conduct. The order, in finding that "such failure" of the city and the council violates the plaintiffs' rights and frustrates the court's remedial efforts, unambiguously refers to the post-June 1971 non-action alleged in the supplemental complaint, not to the pre-1969 conduct discussed in the 1969 opinion. (See Findings G and H of the April 1972 order, 342 F.Supp. at 829, A.22.)

There is also an implication that the district court acted against the new defendants pursuant to Rule 65(d) of the Federal Rules of Civil Procedure. (p. 17.) It is plain that there was no reliance upon Rule 65(d). The new defendants were added by an order entered pursuant to a motion under Federal Rules 15(d), 19 and 21. (Motion to Add Parties Defendant and to File Supplemental Complaint, and Order pursuant thereto, Record Docs. No. 1 and 3). The complaint was served and answers filed. The April 1972 order was entered only after a trial was thereafter had on issues framed by the supplemental complaint and answers.

The procedure is of course a familiar one. In *Wright* v. *Council of City of Emporia*, *supra*, 407 U.S. 451, the Emporia, Virginia, city council was added as a defendant by a 1969 supplemental complaint (407 U.S. at 458) to a 1965 school desegregation case (*Id.* at 455) in which relief had been granted against the local school board. *Ibid.* The supplemental complaint sought to prevent the council from exercising its powers under state law to create a separate city school system on the ground, as the district court ultimately found, that to do so would

constitute an impermissible frustration of its desegregation order. 407 U.S. at 458. Emporia argued that because it was a separate political jurisdiction, entitled under state law to establish its own school system, it could be enjoined only upon a finding either that the state law under which it was acting was unconstitutional, that its boundaries were drawn so as to exclude Negroes, or that racial imbalance alone violated the Constitution. *Id.* at 459. Affirming the injunction that prevented the city council from exercising its otherwise valid authority under state law to create the separate city school system, this Court said it "made no such findings," *ibid.*, but nonetheless concluded:

> "If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Id.* at 460.

See also, *United States* v. *Scotland Neck City Board of Education, supra,* 407 U.S. at 489-90.

Other cases similarly involve joinder of local legislative bodies (city councils or county boards) at the relief stage of a case where necessary to effectuate remedial orders. For example, in *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964), the county board of supervisors was joined by a 1961 supplemental complaint, 7 years after the determination of liability in litigation begun 10 years earlier. 377 U.S. at 220-21, 224, 227. The reason for joinder was that ordinances enacted by the county board (resulting in the closure of schools) were frustrating the desegregation of public schools. See *Allen* v. *County School Board of Prince Edward County,* 198 F.Supp. 497, 502-03 (D.C. Va. 1961). In remanding to the district court for still further relief this Court said:

"[T]he cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so." 377 U.S. at 234.

CONCLUSION

It is over 4 years since CHA was first ordered to provide the unsegregated public housing opportunities that form the essential ingredient of relief in this case. A district court supervising a desegregation case has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. [citations omitted]" *Green* v. *School Board of New Kent County*, 391 U.S. 430, 438n.4 (1968). The obligation includes the duty to take account of changing factual situations and to employ whatever equitable remedial powers are necessary to assure "effectiveness" of the desegregation plan, *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971), to assure "that state-imposed segregation has been completely removed," "eliminated root and branch." *Green* v. *County School Board*, *supra*, 391 U.S. at 438, 439. To this end a district court "may and should consider the use of all available techniques . . ." *Davis*, *supra*, 402 U.S. at 37.

It is clear beyond cavil that to accomplish such remedial purposes the district court could order that new parties be joined. It is equally clear that state laws may not be relied upon to impede or frustrate the carrying out of such remedial orders.

In the circumstances of this case these principles clearly compelled the entry of the April 1972 order. That order conflicts with no decision of this Court or any Court of Appeals, and it is consistent with national housing policy. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

Northern District of Illinois, Eastern Division

Dorothy Gautreaux, et al., Plaintiffs, v. Chicago Housing Authority, a corporation, Clement E. Humphrey, Executive Director, Chicago Housing Authority, George W. Romney, Secretary, Department of Housing and Urban Development, Richard J. Daley, Mayor, City of Chicago, Fred B. Roti, et al, members of the City Council of the City of Chicago, and the City of Chicago, a municipal corporation, Defendants.	No. 66 C 1459 No. 66 C 1460 (Consolidated)

SUPPLEMENTAL COMPLAINT

Now come plaintiffs, by their attorneys, and for their supplemental complaint against defendants state as follows:

1. Defendant Richard J. Daley resides within and is Mayor of the City of Chicago, Under Section 3-11-14, Chapter 24, Illinois Revised Statutes, the Mayor of the City of Chicago presides at meetings of the City Council of the City of Chicago ("City Council") and has the power to vote at such meetings under certain circumstances.

2. Defendants Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William

Cousins Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszcuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda, and Jack I. Sperling are all the duly elected and acting members of the City Council and reside in the City of Chicago.

3. Defendant City of Chicago ("City") is an Illinois municipal corporation having a population of more than 500,000 persons. The City Council is the governing body of the City.

4. On February 10, 1969, this Court issued its memorandum opinion in this cause. 296 F.Supp. 907.

5. On July 1, 1969, this Court entered its judgment order ("Judgment Order") in this cause. 304 F.Supp. 736.

6. On September 10, 1971, the Court of Appeals for the Seventh Circuit issued its opinion in this cause. 448 F.2d 731. Pursuant thereto this Court entered its order of December 23, 1971.

7. The Judgment Order provides, among other things, that the defendant Chicago Housing Authority ("CHA") shall

"use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end . . ." (304 F.Supp. at 741.)

8. CHA's efforts to increase the supply of Dwelling Units as provided in the Judgment Order require CHA to acquire real property.

9. Section 9 of Chapter 67½, Illinois Revised Statutes, provides in part that no real property shall be acquired in a municipality having a population in excess of 500,000 by the housing authority within whose area of operation such municipality is located until the housing authority has advised the governing body of the municipality of the description of the real property proposed to be acquired and the governing body of the municipality has approved the acquisition thereof by the housing authority. Such provisions of said Section 9 are deemed by CHA to apply to its acquisitions of real property.

10. From July 1, 1969 until March 5, 1971, CHA did not advise the City Council of any real property proposed to be acquired by it for the purpose of increasing the supply of Dwelling Units in conformity with the Judgment Order.

11. On March 1, 1971, this Court entered an order directing CHA to advise the City Council on or before March 5, 1971, of real property proposed to be acquired by it for the purpose of providing not fewer than 1500 Dwelling Units in conformity with the Judgment Order. On March 5, 1971 CHA complied with such order and did so advise the City Council.

12. On January 3, 1972 this Court entered an order directing CHA to file certain plans with the Court on

or before January 18, February 2 and February 17, 1972, respectively. In its "Response" to paragraph 1 of such order, filed by CHA on January 18, 1972, CHA advised the Court as follows:

(a) In June, 1971, the City Council approved the acquisition by CHA of real property said by CHA to be suitable for the provision of 302 Dwelling Units in conformity with the Judgment Order; and

(b) Subject to the approval of the Department of Housing and Urban Development ("HUD") CHA proposes to acquire real property, the acquisition of which was so approved by the City Council in June, 1971, at 29 different locations, said to be suitable for the provision of 199 Dweling Units in conformity with the Judgment Order.

13. Since June, 1971, the City Council has not approved the acquisition by CHA of the any real property for the purpose of providing Dwelling Units in conformity with the Judgment Order.

14. Relying upon such lack of such approval and upon the provisions of Section 9, Chapter 67½, Illinois Revised Statutes, CHA has not acquired real property for the provision of Dwelling Units in conformity with the Judgment Order. Such failure by CHA to acquire real property for such purpose has the effect of denying to the plaintiffs the relief to which they are entitled under the Judgment Order and of preventing this Court from providing a full remedy for the violations of federal constitutional rights which this Court's memorandum opinion of February 10, 1969, found to have occurred.

15. Paragraph 2 of this Court's order of January 3, 1972, requires CHA to file with the Court on or before

February 2, 1972, a specific plan for the prompt acquisition by CHA, regardless of any action taken or not taken by the City Council, of such number of additional sites for Dwelling Units as will, when added to the sites approved by the City Council in June, 1971, permit CHA to provide the 1500 Dwelling Units referred to in this Court's order of March 1, 1971. Such order of January 3, 1972, further provides that a hearing for the consideration of such plan and the entry of further orders in connection therewith shall be held on February 17, 1972.

Wherefore, following such hearing on February 17, 1972, plaintiffs pray:

(a) for the entry of a declaratory judgment that under the circumstances set forth herein the effect of the operation of Section 9, Chapter 67-½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from providing a full remedy for the violations of federal constitutional rights which the Court's memorandum opinion of February 10, 1969, found to have occurred;

(b) for the entry of an order directing CHA to acquire, regardless of any action taken or not taken by the City Council, such additional sites for Dwelling Units as are specified in CHA's plan therefor to be filed on February 2, 1972, subject to such modifications therein as may be appropriate in light of the evidence adduced at such hearing of February 17, 1972;

(c) for the entry of an order directing CHA to provide Dwelling Units on such additional sites as rapidly as possible; and

(d) for the entry of an order granting plaintiffs such other and further relief as the Court may deem just and equitable.

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February 1, 1972

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APPENDIX B

(Excerpts from Memorandum Filed by HUD on November 23, 1971 in the District Court.)

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Dorothy Gautreaux, et al.,
Plaintiffs,
v.
George W. Romney, et al.,
Defendants.
No. 66 C 1460

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE AND MOTION TO ALTER OR AMEND THE JUDGEMENT ORDER ENTERED NOVEMBER 11, 1971

An examination of the record in these cases reveals that the City of Chicago holds the key to any meaningful progress in redressing the racially discriminatory public housing program which has evolved over the last three decades in the City of Chicago. . . .

More recently, it has been the City of Chicago, through the City Council and the Committee on Planning and Housing, which has effectively blocked the consideration of approximately 190 of the 275 sites proposed for public housing and submitted by the Chicago Housing Authority for approval, pursuant to an order of this court entered March 1, 1971 in *Gautreaux* v. *Chicago Housing Authority.* To date, the Committee on Planning and Housing has held no public hearings on these 190 sites and has not even

scheduled such hearings. . . The refusal to hold public hearings and presenting the proposed sites to the City Council for consideration is a deliberate affront to this court and is totally contrary to the representations made by the City in the May 12, 1971 Letter of Intent, between the City of Chicago, the Chicago Housing Authority and the United States Department of Housing and Urban Development. Thus, if there is to be any real progress in the construction of low-rent family housing in the City of Chicago in conformity with the orders of this court it is essential that any further remedial order encompass the intervenor, the City of Chicago. . .

The veto power as exercised by the City Council of the City of Chicago over low cost housing sites has created a situation identical with that found in *Kennedy Park Homes Association* v. *City of Lackawanna, supra,* [436 F.2d 108 (2d Cir. 1970)] . . .

CONCLUSION

In order to achieve any real results in correcting the racially discriminatory public housing program in the City of Chicago both the City of Chicago and the Chicago Housing Authority must be actively participating with the Department of Housing and Urban Development. . .